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90-1883

No. 90-_____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

NURSE MIDWIFERY ASSOCIATES,
SUSAN SIZEMORE,
VICTORIA HENDERSON,
DARRELL MARTIN, M.D.,
RICHARD CARPENTER AND MARGARET CARPENTER

Petitioners

v.

HENDERSONVILLE COMMUNITY HOSPITAL
AND
SOUTHERN HILLS HOSPITAL

Respondents

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether, as a matter of law, a trial court is precluded from finding that a hospital conspired with members of its medical staff to restrain trade in violation of Section 1 of the Sherman Act by denying staff privileges to practitioners in potential competition with those staff members.

2. Whether a hospital can be vicariously liable under Section 1 of the Sherman Act for a decision by its medical staff denying staff privileges to practitioners in potential competition with those staff members.

LIST OF PARTIES

The parties to the proceedings below were Nurse Midwifery Associates, Susan Sizemore, Victoria Henderson, Darrell Martin, M.D., and Richard and Margaret Carpenter. Vanderbilt University Hospital, State Volunteer Mutual Insurance Company, Conrad Shackleford, M.D., Harry Baer, M.D., Stephen Melkin, M.D., George Andrews, M.D., and B. K. Hibbett, M.D., were Appellees below. As Petitioners have reached separate settlements with regard to these parties, they are not named as parties herein.

The Respondents before this Court are Hendersonville Community Hospital and Southern Hills Hospital.

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Sixth Circuit entered in the above-entitled proceeding on March 12, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 918 F.2d 605 (6th Cir. 1990).

The opinion of the United States District Court for the Middle District of Tennessee is reported at 689 F. Supp. 799 (M.D. Tenn. 1988).

STATEMENT OF JURISDICTION

Petitioners filed their Complaint seeking damages and injunctive relief for alleged violations of 15 U.S.C. §1 in the United States District Court for the Middle District of Tennessee.

On March 14, 1988, the District Court granted Respondents' partial summary judgment.

On November 4, 1990, the Sixth Circuit issued its opinion affirming the District Court as to Respondents. Petitioners' Petition for Rehearing was granted on March 12, 1991 and the Sixth Circuit entered its judgment modifying its previous ruling with respect to a party not before this Court.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

15 U.S.C. §1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy,

in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 and 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by

imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE[1]

Nurse Midwifery Associates (NMA) was, at all times pertinent to this litigation, a professional partnership for the provision of nurse midwifery services. Its principals are Susan Sizemore and Victoria Henderson, who are registered nurses and certified nurse midwives.[2] Dr. Darrell Martin, a licensed physician in Tennessee, is the physician with whom they jointly developed their protocol.[3]

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[1]Extensive findings of fact were made by the Magistrate who heard the Motions for Summary Judgment in this case. No objections to the findings were made by these Respondents. Because this case arose from Motions for Summary Judgment filed against Petitioners, the facts are to be considered in a light most favorable to Petitioners. Matsushita Electric Industrial Co., Inc. vs. Zenith Radio, 106 S.Ct. 1348, 1357 (1986).

[2]Certified nurse midwives are registered nurses who have completed an educational program in midwifery approved by the American College of Nurse Midwives.

[3]In conformity with the standards of the American College of Nurse Midwives, certified nurse midwives who provide maternity services must have a relationship with a qualified obstetric physician in which the physician is responsible for the medical care provided. The supervisory relation-

After engaging for many years in the practice of nurse midwifery under the laws of Tennessee, Sizemore and Henderson saw the need for a nurse midwifery service in the private sector, and decided to enter into a business arrangement to provide such services. Two hospitals capable of accommodating nurse midwives were Respondents Hendersonville Community Hospital (HCH) and Southern Hills Hospital (SHH). In January, 1980, NMA was formed and entered into an agreement with Dr. Martin, providing that NMA would be a financially independent practice for which Dr. Martin and his associates would provide medical supervision and services.

1. Hendersonville Community Hospital

Hendersonville Community Hospital is a small, privately owned community hospital in Hendersonville, Sumner County, Tennessee. Martin was a member of the active medical staff at HCH, as were the two obstetricians with whom he practiced obstetrics.

At the time, HCH had a relatively low patient census. Dr. Martin met with the Administrator of HCH regarding the proposed practice of Sizemore and Henderson. The Administrator had a positive reaction to this proposal. Accordingly, Sizemore and Henderson submitted to HCH their applications for clinical privileges to practice

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ship is usually embodied in a jointly developed document referred to as a protocol.

nurse midwifery in collaboration with Dr. Martin.

Henderson and Sizemore were advised that their applications had been approved by the HCH Obstetrics and Gynecology (OB/GYN) Department, pending approval of their protocol which was perceived to be perfunctory in their case, as it merely addressed adjustments of patient care responsibilities.

The protocol was subsequently approved by the HCH OB/GYN Department and was then referred to the Anesthesia and Pediatric Departments. The Anesthesia Department approved the protocol. The Pediatric Department, however, unanimously recommended that NMA's application for privileges be denied because of six concerns about the proposed practice.[4] The professional competence of Henderson and Sizemore was not among the concerns raised.

A number of subsequent meetings were held in April and May by the Pediatric Department itself and between the Pediatric and Obstetric Departments together. Although the concerns of the pediatricians apparently had been satisfactorily answered, the pediatricians continued to refuse to approve the protocol.

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[4]The concerns addressed issues of proximity, travel time, medico-legal implications, and use of the birthing facilities by noncommunity residents.

At one meeting of the Medical-Executive Committee, the chair of the Pediatric Department told the Committee that a number of pediatricians would leave the staff of HCH, if they were "forced" to accept newborns delivered by Henderson and Sizemore.

Thereafter, the Pediatric Department met again and agreed that despite the resolution of concerns previously raised, the Pediatric Department would not review the protocol. Further, they agreed not to treat newborn patients delivered by Henderson and Sizemore according to the on-call schedule routinely utilized for newborns delivered by obstetricians. Finally, they agreed that Henderson and Sizemore would have to recruit a new pediatrician to serve as back-up and to review the pediatric portion of the protocol.

The HCH Executive Committee accepted the final action of the Pediatric Department and denied the application for clinical staff privileges. Henderson and Sizemore were unable to initiate their practice at HCH.

2. Southern Hills Hospital

Southern Hills Hospital is a small, privately owned community hospital in Nashville, Tennessee. Like HCH, it is governed by a Board of Trustees having ultimate authority and responsibility for hospital affairs, with day-to-day medical care and hospital administration carried out by the active medical and hospital administrative staffs, respectively. Prior to any final action by HCH on the midwives'

applications for privileges at that hospital, Sizemore and Henderson applied to SHH, seeking clinical privileges and appointment to the medical staff.

Dr. Martin and Ms. Sizemore met with the Administrator of SHH, who confirmed that the SHH By-Laws would permit the granting of privileges to nurse midwives. He was generally encouraging regarding the practice Plaintiffs proposed, but stated that he did what the doctors at SHH wanted him to do. SHH, like HCH, was operating at a low hospital census at the time.

The Executive Committee of SHH appointed an Ad Hoc Committee to review the applications and study the nurse midwifery issue. The members appointed to the Ad Hoc Committee were Dr. George Andrews, the Chairman of SHH's OB/GYN Department, a pediatrician, a family practice physician, and the attorney and legal counsel to the Committee. The obstetrician chaired the Committee. The Ad Hoc Committee was instructed to review the applications of Sizemore and Henderson, to hold interviews with all persons directly involved, if necessary, and to report to the Executive Committee with an impartial recommendation. The Committee was reported to have met at least three times, but no minutes were ever taken of its deliberations. Other than for the first meeting, no notices were sent to the Committee members of subsequent meetings. Other than the Business Plan submitted by Henderson and Sizemore to the Committee and its Final Report, apparently no other documents were reviewed or considered by the Committee.

While the Ad Hoc Committee was conducting its investigation, the Board of Trustees approved Dr. Martin's requested privileges and postponed a decision on the applications of Sizemore and Henderson, pending the ongoing review of the Ad Hoc Committee.

In July, 1980, Dr. Martin met with Dr. Stephen Melkin, a specialist in OB/GYN at SHH, and a member of the hospital's Executive Committee. Dr. Melkin also practiced medicine in partnership with Dr. Harry Baer at both SHH and Baptist Hospital in Nashville. Dr. Melkin displayed an extremely negative reaction to NMA, and stated, "If nurse midwives started delivering babies, the next thing they would want to do is heart surgery."

Dr. Baer told another obstetrician that Sizemore and Henderson would get privileges at Baptist Hospital "over his dead body." He expressed concern that other obstetricians, just starting out, were not yet "up to capacity."

In August, 1980, Dr. Martin, Ms. Sizemore and Ms. Henderson met with the Ad Hoc Committee, offered their protocol and answered questions, most of which bore little or no relation to the manner in which nurse midwives practiced or the specific practice arrangement between Martin, Henderson and Sizemore.

The Ad Hoc Committee report, approved by the SHH Executive Committee, recommended that Sizemore and Henderson's applications be denied, but articulated certain condi-

tions the satisfaction of which would warrant approval.[5]

On October 16, 1980, the recommendation of the Executive Committee regarding the applications of the nurse midwives was presented to the SHH Board of Trustees. The Board unanimously decided that the nurse midwives' applications as submitted should be denied; however, any re-applications conforming to the recommendations of the AD Hoc Committee would be considered.

Henderson, Sizemore and Martin were informed of the decision at a meeting of the Obstetric Department to which they were invited on October 22, 1980. Henderson and Sizemore expressed their intention to reapply for privileges, addressing the recommendations made by the Ad Hoc Committee. At this time, Dr. Andrews told them that if they were to reapply, the Obstetrics Department would adopt new policies that would preclude the family centered maternity practice that Henderson, Sizemore and Martin intended to practice at SHH.

In November, 1980, Drs. Melkin, Baer and Andrews agreed at a meeting of the Obstetrical Department to impose the new policies described by Dr. Andrews at the

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[5]Among the conditions were requirements that two obstetricians with staff privileges at SHH supervise Henderson and Sizemore, an obstetrician be present for all deliveries, and the supervisory obstetrician provide adequate liability insurance indemnifying SHH for the actions of the nurse midwives.

October meeting, and to close the birthing room. Henderson, Sizemore and Martin were thereby precluded from initiating their practice at SHH.

Petitioners filed a Complaint in the United States District Court for the Middle District of Tennessee seeking damages and injunctive relief under Section 1 of the Sherman Act, among other claims. The District Court entered summary judgment for Respondents on the ground that a hospital and its medical staff could not conspire under Section 1 of the Sherman Act. The Sixth Circuit affirmed, acknowledging that there is a conflict in the circuits on this precise issue.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT AMONG FIVE CIRCUIT COURTS OF APPEALS ON THE QUESTION OF WHETHER A HOSPITAL AND ITS MEDICAL STAFF ARE CAPABLE OF CONSPIRING UNDER SECTION 1 OF THE SHERMAN ACT.

Section 1 of the Sherman Act proscribes contracts, combination and conspiracies in restraint of trade. 15 U.S.C. §1. A prerequisite for a Section 1 claim is proof of an agreement between actors with distinct economic interests.

This Court has previously held that a corporation and its wholly-owned subsidiaries are incapable of concerted action for

purposes of Section 1. *Copperweld Corp. vs. Independence Tube Corp.*, 467 U.S. 752 (1984). Because an agreement between a corporation and its wholly-owned subsidiary does not unite two independent sources of economic power, such agreements are viewed as unilateral conduct beyond the scope of Section 1. *Copperweld*, 467 U.S. at 771.

An issue expressly not considered by this Court in the *Copperweld* case was: ". . . under what circumstances, if any, a parent may be liable for conspiracy with an affiliated corporation it does not completely own[?]" *Copperweld*, 467 U.S. at 767.

Copperweld also insulates agreements involving officers and employees of corporations and their wholly-owned subsidiaries from the reach of Section 1:

> The rationale is that agents of a single firm share a unity of economic purpose with the firm so that agreements, combinations and concerted action among them do not impermissibly coalesce economic power that was previously directed towards disparate goals.

Potters Medical Center vs. City Hospital Association, 800 F.2d 568, 577 (6th Cir. 1986); *see, Copperweld.*, 467 U.S. at 769.

However, as in this case, members of a hospital medical staff are ofttimes not employees of a hospital but are medical practitioners in competition with each other as providers of health care services.

See, Blumstein and Sloan, Anti-Trust and Hospital Peer Review, 51 Law and Contemporary Problems 7, 41-45 (1988).

Without clear guidance from this Court, five Circuit Courts of Appeals have diverged on the issue of whether a hospital is capable of conspiring with its medical staff in violation of Section 1 of the Sherman Act.

Two Circuits, the Sixth, in this case, and the Third, have concluded that the organized medical staff of a hospital acts as an agent of the hospital and therefore "does not provide the plurality of actors necessary for a Section 1 conspiracy." *Weiss vs. York Hospital*, 745 F.2d 786 (3rd. Cir. 1984), *cert. denied.*, 470 U.S. 1060 (1985); *Nurse Midwifery Associates, et al. vs. Hibbett, et al.*, 918 F.2d 605 (6th Cir. 1990).

As one commentator has observed, the underlying analysis of the *Weiss* case (which was followed by the Sixth Circuit) is internally inconsistent. These courts have held that individual members of a hospital medical staff are independent economic actors capable of entering into an actionable horizontal restraint. Yet the same courts have found a unity of interest between the medical staff and the hospital creating a "per se" rule of validity. *Blumstein and Sloan*, Anti-Trust and Hospital Peer Review, 51 Law and Contemporary Problems 7, 50-53 (1988).

On the other hand, three Circuit Courts of Appeals, the Fourth, Ninth and

Eleventh, have concluded that "a hospital and the members of its medical staff . . . are legally separate entities . . . . ," and, thus, can, as a matter of law, conspire within the meaning of the Sherman Act. *Bolt vs. Halifax Hospital Medical Center*, 891 F.2d 810, 819 (11th Cir. 1990); *cert. denied.*, 58 U.S.L.W. 3690 (April 30, 1990); *Oltz vs. St. Peters Community Hospital*, 861 F.2d 1440 (9th Cir. 1988); *Oksanen vs. Page Memorial Hospital*, 912 F.2d 73 (4th Cir. 1990) *rehearing en banc* granted (September 30, 1990).

These Circuits rely on two points central to the Court's reasoning in *Copperweld*: first, hospitals and their medical staff doctors have different economic interests; and second, hospitals cannot exert full control over the medical staff if it fails to act in the hospital's best interest. *Copperweld*, 467 U.S. at 771-772. *Blumstein and Sloan*, Anti-Trust and Hospital Peer Review, 51 Law & Contemporary Problems 7, 51 (1988); *see also, Kissam, Webber, Bigus and Holzgraefe*, Anti-Trust and Hospital Privileges, Testing the Conventional Wisdom, 70 Cal. L. Rev. 590, 639-40 (1982).

This Court should grant certiorari to resolve the divergent analyses among the Circuit Courts of Appeals with regard to whether a hospital and members of its medical staff are capable of conspiracy under Section 1 of the Sherman Act.

II. THIS COURT HAS NEVER DETERMINED WHETHER THERE IS AN INDEPENDENT PERSONAL STAKE EXCEPTION TO THE INTRACORPORATE CONSPIRACY DOCTRINE.

Although not specifically required for the holding in *Copperweld*, this Court stated that the intracorporate conspiracy doctrine includes agreements between the officers of a parent and its subsidiary. *Copperweld*, 467 U.S. at 769.

The *Copperweld* case concerned an agreement between a corporation and its wholly-owned subsidiary. The agreement was the basis of a Section 1 claim by a competitor. Rejecting previous decisions holding that intra-enterprise conspiracies were actionable as a matter of law, the Court held that a corporation and its wholly-owned subsidiary are to be considered one economic unit for purposes of Section 1 of the Sherman Act. Therefore, the plurality of actors necessary for a Section 1 claim was absent. *Copperweld*, 467 U.S. at 771.

Even if a medical staff should be considered the agent of a hospital within the *Copperweld* doctrine, as held below, further analysis should be required to determine if there was sufficient independent economic stake by the medical staff members in the privilege decision to create an actionable agreement.

This Court noted, in *Copperweld*, that at least three Circuit Courts of Appeals, the Third, Fourth and Fifth, have acknowledged an exception for corporate officers

acting on their own behalf. *See, Copperweld*, 467 U.S. at 769, n. 15; *Johnston vs. Baker*, 445 F.2d 424, 427 (3rd Cir. 1971); *Greenville Publishing Company vs. Daily Reflector, Inc.*, 496 F.2d 391, 394 (4th Cir. 1974) (*dictum*); *H & B Equipment Company vs. International Harvestor Company*, 557 F.2d 239, 244 (5th Cir. 1978) (*dictum*).

The Sixth Circuit, in the case below, held that it was "not convinced that an agent acting with anti-competitive motives raises sufficient antitrust concern to warrant abandoning the traditional rule that a principal cannot conspire with one of its agents." *Nurse Midwifery Associates vs. Hibbett, et al.*, 918 F.2d 605 at 614 (6th Cir. 1990).

In hospital staff privilege decisions, especially involving nonphysician providers (as in this case), individual members of the medical staff have independent economic interests distinct from those of the hospital. Members of the medical staff are interested in protecting themselves from economic competition for both patient and hospital services. The interest of the hospital administration, on the other hand, lies in promoting quality of care and efficiency. *Kissam, supra* at 612.

The physicians involved in the actions challenged by the Petitioners were all private practitioners, not salaried employees of the hospital, and, therefore, akin to independent contractors who provide services that are outside the scope of their hospital roles. Because of this independent role "the relationship between

medical staff members and a hospital is more analogous to the relationship between a corporation and its 'outside agents'--lawyers, accountants, advertising firms, and consultants--than to the relationship between a corporation and its salaried employees." *Kissam, supra* at 640. Outside agents are separate enough from the businesses for which they work to be treated as co-conspirators under Section 1 of the Sherman Act. *Poller vs. Columbia Broadcasting System*, 368 U.S. 464, 469-70 (1961).

Through the use of their powers in hospital privilege decisions, members of a hospital medical staff can achieve anti-competitive goals (*i.e.*, exclusion of potential competitors) in a manner "[they] could not achieve by acting unilaterally." *Note, Conspiring Entities*, 95 Harv. L. Rev. 661, 680 (1982).

This Court should grant the Writ prayed for herein to determine whether an independent personal stake exception to the intracorporate conspiracy doctrine exists.

III. THE DECISION OF THE SIXTH CIRCUIT RAISES IMPORTANT QUESTIONS REGARDING THE REACH OF THE SHERMAN ACT TO HOSPITAL PRIVILEGES DECISIONS.

Antitrust law continues to play an important role in the health care industry. Accordingly, this Court continues to be called upon to apply the legal concepts of

conspiracy and monopolization to new and varied relationships through which health care services and products are distributed. *See, Arizona vs. Maricopa County Medical Society*, 457 U.S. 322 (1982); *FTC vs. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

One particular area of concern has been those practices that have the effect or are intended to reduce or eliminate competition among health care providers. Sometimes, these efforts are aimed at practitioners of the same field or specialty, *Patrick vs. Burgett*, 108 S.Ct. 1658, (1988) (competition between surgical specialists); in other instances, a restraint or agreement is employed by practitioners of one field against those in another. *See, Blue Shield of Virginia vs. McCready*, 457 U.S. 465 (1982) (restraints imposed by psychiatrists upon psychologists).

The anti-competitive acts of which Petitioners complain in this case were very similar to those which have been condemned by the Court in its many decisions involving the actions of organizations, whether for-profit or nonprofit, operated, controlled, and dominated by competitors. *Silver vs. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burner, Inc. vs. Peoples Gas, Light and Coke Company*, 364 U.S. 656, 81 S.Ct. 365 (1961); *Fashion Originators Guild vs. F.T.C.*, 312 U.S. 457 (1941).

Since 1975, there has been no question that the reach of Section 1 of the Sherman Act extends to the actions of professional

associations and organizations, dominated and controlled by members of a profession. *Goldfarb vs. Virginia State Bar*, 421 U.S. 773 (1975); *National Society of Professional Engineers vs. U.S.*, 435 U.S. 679 (1978).

The underlying concern expressed by the Court throughout these decisions is the effect that professional organizations dominated by a group can have on competition in the markets in which professionals engage. *See, Kissam*, Antitrust Law and Professional Behavior, *62 Texas L. Rev. 1, 54-60* (1983).

In the context of this case, Petitioners' claim that through physician control of medical staff privilege decisions, practicing physicians were able to eliminate competition in the health service market for obstetrics by withholding an essential service necessary for effective competition in that market: hospital clinical privileges.

Through their concerted acts, both horizontally among themselves, and vertically, with the respective Respondent hospitals, the physicians were able to eliminate a potential competitor in the obstetrical marketplace in Nashville, Tennessee with consequent effects on consumer choice and price.

Over the past ten years, this Court has continually addressed important antitrust issues with respect to the health care industry: the peer review process, *Patrick vs. Burgett*, 108 S.Ct. 1658 (1988); foundations for medical care, *Arizona vs.*

Maricopa County Medical Society, 457 U.S. 332 (1982); and whether a hospital privilege decision has sufficient effect on interstate commerce under the Sherman Act will be addressed this term when the Court decides *Summit Health, Ltd. vs. Pinchas*, 894 F.2d 1024 (9th Cir. 1989) *cert. granted*, 58 U.S.L.W. 3795 (June 19, 1990).

A major issue not specifically addressed is that left open in *Copperweld* and raised in this Petition: whether a hospital can conspire with members of its medical staff in violation of Section 1 of the Sherman Act. However, even if an actionable conspiracy does not exist, the question remains whether a hospital may be vicariously liable in a privileges case for the action of its medical staff.

With regard to the first question, focusing on the reality of hospital privilege decision making rather than its form, as required under *Copperweld*, medical staff members do not share that unity of purpose that molds them into one economic unit with the hospital in which they practice. Merely calling medical staff members "agents" does not magically remove them from the medical marketplace and the competitive pressures that exist.

In *Oltz vs. St. Peters Community Hospital*, 861 F.2d 1440 (9th Cir. 1980), the Ninth Circuit recognized this reality. In *Oltz*, a nurse anesthetist whose contract for anesthesia services was terminated sued the private hospital and members of its medical staff alleging violations of Section 1. In upholding the lower court's

jury verdict in favor of the plaintiff and rejecting the hospital's argument that plaintiff's claim was barred by the intra-enterprise conspiracy doctrine the court said:

> Although the M.D. anesthesiologists may have been the agents of St. Peters for some purposes, their interests were not as wed as the ties between a corporation and its officers or employees. St. Peters did not pay the anesthesiologists a salary; they billed the patients they served directly. The anesthesiologists were independent contractors pursuing their personal economic interests when they pressured St. Peters to eliminate Oltz as a direct competitor. Those interests were sufficiently independent so that the collaborated conduct between the anesthesiologists and St. Peters coalesced economic power previously directed at disparate goals.

Id. at 1450.

On the other hand, if medical staff members are merely agents, then the doctrine of *respondeat superior* should apply and the Sixth Circuit was in error affirming summary judgment notwithstanding its reliance on *Copperweld*.

A principal is civilly liable under the antitrust laws for the antitrust violations of its agents committed with apparent

authority. *American Society of Mechanical Engineers, Inc. vs. Hydrolevel Corporation*, 456 U.S. 556 (1982). As the Sixth Circuit concluded that medical staff members are independent economic entities capable of conspiring among themselves within the meaning of Section 1 of the Sherman Act but that the medical staff members were acting as agents of the Respondents, then Respondents should be vicariously liable for any agreement among the medical staff members to restrain Petitioners from providing maternity care and services.

In *Hydrolevel*, employees of one manufacturer used their positions as officers of a nonprofit, standard setting organization to injure a competitor of their employer. The Court held that the employer organization was vicariously liable for the acts of its agents, even though the agents did not act with an intent to benefit the organization, and even though the organization did not ratify the acts of their agents. *Id.* at 574.

To the extent that medical care, in this country, is based, in large part in hospital care, the questions raised in this Petition assume major importance as new types of health care practitioners emerge and as an increasing number of medical doctors seek admitting and clinical privileges for hospital care. *See, generally, Kissam*, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 Cal. L. Rev. 605 (1982).

This Court should take the opportunity presented by this Petition to clarify the

application of Section 1 of the Sherman Act to the concerted action that arises in hospital privilege decision making.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 88-5842, 89-5491

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NURSE MIDWIFERY ASSOCIATES; SUSAN SIZEMORE; VICTORIA HENDERSON; DARRELL MARTIN, M.D.; RICHARD AND MARGARET CARPENTER,
Plaintiffs-Appellants (88-5842),
Plaintiffs-Appellees (88-5491),

v.

B.K. HIBBETT, M.D.; E. CONRAD SHACKLEFORD, M.D.; GEORGE ANDREWS, M.D.; STEPHEN MELKIN, M.D.; HARRY BAER, M.D.; STATE VOLUNTEER MUTUAL INSURANCE COMPANY, INC., and VANDERBILT UNIVERSITY HOSPITAL,
Defendants-Appellees (88-5842),
SOUTHERN HILLS HOSPITAL; and HENDERSONVILLE COMMUNITY HOSPITAL,
Defendants-Appellants (88-5491).

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed November 6, 1990

Before: MARTIN and NORRIS, Circuit Judges; and CONTIE, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. This case involves two appeals arising out of an antitrust action brought by two nurse midwives, the obstetrician with whom they had affiliated, and three of their clients, against three Nashville hospitals, certain members of the medical staffs from two of the hospitals, another practicing obstetrician in Nashville, and a physician-controlled insurance company. Plaintiffs alleged that these defendants had engaged in several conspiracies to restrain trade, in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Plaintiffs now appeal the district court's decision awarding summary judgment to defendants with respect to all but one of the alleged conspiracies. Two of the hospitals also bring an interlocutory appeal, contending that the district court erred in denying summary judgment with respect to the alleged conspiracy between the two hospitals. For the reasons stated, we affirm in part and reverse in part.

I.

In an earlier opinion, in which it ruled upon a motion to dismiss, the district court well-summarized the gravamen of plaintiffs' cause of action.

> The crux of the complaint is that the defendant physicians, in order to protect their lucrative obstetrics practices in Nashville, Tennessee, sought to prevent the nurse midwives from competing with them. The defendant physicians allegedly entered into a conspiracy for the purpose of preventing plaintiffs from operating a family-centered maternity practice or offering nurse midwifery services at hospitals in the Nashville area. In furtherance of that objective the defendant physicians determined to bar plaintiff

> nurse midwives from obtaining hospital privileges at defendant hospitals and the supervision of a licensed physician.
>
> The complaint alleges that in order to offer the type of maternity practice plaintiffs contemplated, a qualified obstetrician must be responsible for the medical care provided by nurse midwives. To prevent plaintiff nurse midwives' competition, therefore, defendant physicians conspired to bring pressure to bear upon Dr. Martin and any other physician who anticipated collaborative practice with the nurse midwives.

Nurse Midwifery Assocs. v. Hibbett, 549 F. Supp. 1185, 1187 (M.D. Tenn. 1982).

In his report and recommendation on defendants' motion for summary judgment, the magistrate included a thirty-page synopsis of the summary judgment evidence. As the parties did not object to this summary, we will rely upon it for our recitation of the factual background of this appeal.

Plaintiffs Susan Sizemore and Victoria Henderson are certified nurse midwives who formed Nurse Midwifery Associates ("NMA") in order to provide nurse midwifery service in the private sector of the Nashville, Tennessee area. NMA entered into an agreement with plaintiff Dr. Darrell Martin, a practicing obstetrician, under which NMA would operate as an independent practice, and Dr. Martin and his associates would provide medical supervision and services.

A. Henderson Community Hospital and Dr. Shackleford

Henderson Community Hospital ("HCH") is a privately owned community hospital located in Hendersonville, Tennessee, a small town in the Nashville area. Dr. Martin and his associates were members of the active medical staff of HCH. On February 18, 1980, after initial positive discussions

with the administrator of HCH, plaintiffs Henderson and Sizemore submitted their applications for appointment to the medical staff, and for clinical privileges to practice nurse midwifery in collaboration with physicians.

The next day, the hospital's administrator advised Henderson and Sizemore that their applications had been approved by the HCH Obstetrics Department, pending approval of their protocol.[1] On March 8, 1980, the Obstetrics Department approved the protocol.

In late March, the Pediatrics Department, including Dr. Conrad Shackleford, met and discussed the nurse midwifery proposal. The department unanimously recommended that the proposal be rejected, raising six concerns. During April and May, the Obstetrics and Pediatrics Departments held several meetings and, although it appeared that the concerns of the pediatricians had been satisfactorily answered, they refused to approve the protocol.

At a meeting of the Medical-Executive Committee on April 23, 1980, Dr. Shackleford, a member of the committee, said that a number of pediatricians would leave the staff of HCH if they were required to treat newborns delivered by nurse midwives.

At a subsequent meeting, the members of the Pediatrics Department confirmed that they would not treat newborns delivered by nurse midwives under the on-call schedule normally used for newborns delivered by obstetricians. They agreed that a pediatrician with active privileges at HCH should be recruited by nurse midwives to serve as back-up. Dr. Shackleford joined in these agreements.

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[1]The protocol is the document setting out the details of the supervisory relationship between nurse midwives and the supervising obstetrician.

On May 20, 1980, the Executive Committee, including Dr. Shackleford, voted to accept the final action of the Pediatrics Department. As a result of these actions, Henderson and Sizemore were unable to initiate their practice at HCH.

B. Southern Hills Hospital and Drs. Melkin, Andrews and Baer

Southern Hills Hospital ("SHH") is a small, privately owned community hospital in Nashville. Before HCH took final action on their applications, Sizemore and Henderson applied for appointments to the medical staff at SHH. Sizemore and Dr. Martin met initially with the administrator of SHH who told them that SHH by laws would permit the granting of privileges to nurse midwives. The administrator was encouraging regarding their proposal, but stated that he did what the doctors at SHH wanted him to do.

On June 18, 1980, the Executive Committee of SHH began its initial review of the applications and appointed an ad hoc committee to investigate the proposal. The committee was composed of defendant Dr. George Andrews, Chairman of SHH's Obstetrics Department, three other doctors, and an attorney.

In July 1980, Dr. Martin met with Dr. Stephen Melkin, a specialist in OB/GYN at SHH and a member of the Executive Committee. Dr. Melkin displayed an extremely negative reaction toward NMA, stating, "If nurse midwives started delivering babies, the next thing they would want to do is heart surgery."

In that same month, Dr. Harry Baer, an obstetrician who was a member of the SHH medical staff, told an obstetrician at Baptist Hospital that plaintiffs would get privileges at Baptist "over his dead body." Dr. Baer practiced medicine in partnership with Dr. Melkin; both practice at Baptist Hospital as well as SHH. Also, Dr. Baer expressed concern that

other obstetricians just starting out were not yet "up to capacity."

On August 7, 1980, plaintiffs were given an opportunity to discuss their protocol with the ad hoc committee. The committee, most notably Dr. George Andrews, appeared not to be interested in the manner in which nurse midwives practiced or the specific practice arrangement between the plaintiffs, but seemed overly concerned with the financial relationship between nurse midwives and Dr. Martin.

At the SHH Executive Committee meeting on September 25, 1980, the ad hoc committee's report was adopted, recommending that the nurse midwives' applications be denied in their present form. The report also recommended that privileges be granted if additional conditions were met. The principal conditions were that an obstetrician be present for all deliveries, that two obstetricians with privileges at SHH agree to sponsor, supervise, and assume responsibility for the nurse midwives' actions, and that the sponsoring physicians furnish adequate liability insurance indemnifying SHH for the activities of nurse midwives. The report concluded that these conditions were "necessary to assure quality patient care and reduce any risk of injury to a patient with possible ensuing liability to the Hospital."

On October 16, 1980, the SHH Board of Trustees adopted the recommendation of the Executive Committee and denied the nurse midwives' application for privileges. When the administrator informed the petitioners that their applications had been denied, they asked for a copy of the ad hoc committee's report, but were refused. Dr. Andrews told them that if they were to reapply, the Obstetrics Department would adopt new policies regarding mandatory enemas, perineal shaving, electronic fetal monitoring, intravenous fluids and ambulation, and would close the birthing room.

C. Vanderbilt University Hospital and Dr. Hibbett

Vanderbilt University provides medical education through the Vanderbilt University Medical Center, which includes

the university's School of Medicine and University Hospital ("Vanderbilt"). Through 1980, Vanderbilt required that persons seeking practice privileges at its hospital hold an appointment to the faculty of the School of Medicine.

In May 1980, Henderson and Sizemore applied for appointments to the Vanderbilt Allied Medical staff. The Chairman of the Department of Obstetrics and Gynecology, Dr. Lonnie S. Burnett, was vested with sole authority for recommending faculty appointments to the Dean and for selecting and implementing any new programs for the department. Dr. Burnett construed the nurse midwives' application as seeking faculty appointments and as a request for the establishment of a nurse midwifery training program at the hospital.

While the application was pending, both Dr. Burnett and Dr. Frank Boehm, a member of the Vanderbilt OB/GYN Department, held conversations with Dr. B. K. Hibbett, a local obstetrician with privileges at Vanderbilt. Dr Hibbett had recently been Chief of the OB/GYN Department at Baptist Hospital, remained an influential member of its staff, and had been an outspoken opponent of nurse midwifery. All three doctors deny that they discussed the subject of nurse midwifery or the nurse midwives' applications.

Vanderbilt had reason to maintain good relationships with Baptist Hospital. As hospitals with the two largest maternity services in Nashville, there was considerable overlap among their OB/GYN staffs. In addition, Baptist Hospital allowed Vanderbilt's OB/GYN residents to rotate through Baptist as part of their residency training.

On September 2, 1980, Dr. Burnett announced Vanderbilt's decision denying the nurse midwives' applications. Two reasons were given for this decision: (1) Allied Medical Staff members had historically been employees of the institution, and (2) Vanderbilt's commitment to tertiary care made it

inappropriate for the hospital to grant privileges to plaintiffs, who would primarily be doing normal obstetrics.

D. State Volunteer Mutual Insurance Company and Dr. Hibbett

State Volunteer Mutual Insurance Company ("SVMIC") is a nonprofit mutual insurance company, owned and operated by its physician policyholders. The policyholders elect the Board of Directors and participate on SVMIC's committees. SVMIC insures almost eighty percent of all physicians in Tennessee, and is organized under the auspices of the Tennessee Medical Association ("TMA"). Plaintiffs allege that the TMA has long been opposed to the expanded use of nurse midwives.

SVMIC learned in June of 1980 that Dr. Martin would be leaving his practice group and would be associated with NMA. SVMIC's underwriter wrote to Dr. Martin seeking clarification of his relationship with NMA and asking for "any other pertinent information which will help us to determine our exposure as your malpractice carrier."

On July 31, 1980, Dr. Hibbett, a member of the SVMIC Board of Directors and a member of the SVMIC Claims Review Committee, had a conversation with an obstetrical nurse at Baptist Hospital concerning SVMIC's upcoming meeting to consider whether to continue to insure Dr. Martin in light of his affiliation with NMA. During the conversation, Dr. Hibbett told the nurse something to the effect of "we're going to get Dr. Martin's insurance," and that "we would set nurse midwifery back twenty years." An obstetrician who practiced at Baptist Hospital also recalls a similar conversation with Dr. Hibbett.

The Underwriting Committee of SVMIC concluded that Dr. Martin's relationship with nurse midwives increased the underwriting risks to SVMIC to an unacceptable level, and adopted a motion to cancel his insurance. It also named an

ad hoc subcommittee, composed of two Nashville physicians, SVMIC's outside counsel and staff to determine whether its assessment of the risks posed by coverage of Dr. Martin was justified. The committee concluded that the underwriting risks posed by Dr. Martin were in fact unacceptable.

On October 29, 1980, the recommendation of the Underwriting Committee to cancel Dr. Martin's coverage came before the Board of Directors. There was no discussion concerning competition from the midwives or any other competitive considerations. However, the board only reviewed the Consulting Agreement between NMA and Dr. Martin; it did not review the medical protocol which described in detail the medical supervision Dr. Martin would exercise over NMA's practice. The board, including Dr. Hibbett, voted unanimously not to renew Dr. Martin's coverage.

Dr. Martin requested a hearing before the Underwriting Committee and, at the meeting, presented information concerning his arrangement with NMA. The committee determined that it had made the correct decision in recommending that the insurance be terminated, and advised Dr. Martin of his right to appeal the decision to the Board of Directors. He did not appeal.

Henderson and Sizemore were unable to secure the services of another supervising physician and discontinued their nurse midwifery practice.

II.

On March 2, 1981, plaintiffs filed their complaint raising claims under the Sherman Antitrust Act and various pendent state law claims. Named in the suit was HCH and Dr. Shackleford; SHH and Drs. Melkin, Baer, and Andrews; Vanderbilt; SVMIC; and Dr. Hibbett. The complaint alleged that competition was restrained due to conspiracies (1) among HCH, Dr. Shackleford, and the other members of the HCH pediatric staff, (2) among SHH and Drs. Melkin, Baer, and

Andrews; (3) between Vanderbilt and the members of its medical staff, (4) between Vanderbilt and Dr. Hibbett, (5) between HCH and SHH, and (6) between SVMIC and Dr. Hibbett. In addition, plaintiffs contended that the actions of SVMIC constituted the actions of a group of competitors, rather than those of a single company.

Defendants all moved for summary judgment and the motions were referred to a magistrate, who recommended that summary judgment be granted against plaintiffs on all of the federal claims against SVMIC, Drs. Shackleford, Melkin, Baer, and Andrews, and that partial summary judgment be granted in favor of HCH, SHH, Vanderbilt, and Dr. Hibbett. He recommended that summary judgment be denied on plaintiffs' claim of conspiracy between SHH and HCH and their claim of conspiracy between Vanderbilt and Dr. Hibbett. Plaintiffs and defendants SHH, HCH, Vanderbilt, and Dr. Hibbett filed objections to the report and recommendation.

The district court rejected the recommendation that summary judgment be denied with respect to plaintiffs' claim of conspiracy between Vanderbilt and Dr. Hibbett, but adopted the recommendations that summary judgment be granted on all of plaintiffs' claims except their claim of a conspiracy between SHH and HCH. Pursuant to Fed. R. Civ. P. 54(b), the district court determined that there was no just reason for delay and entered final judgment on all of plaintiffs' claims except for the claim of conspiracy between SHH and HCH. Plaintiffs appealed all of these judgments but have since reached a settlement with Vanderbilt.

In addition, the district court entered an order allowing defendants SHH and HCH to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on its decision denying summary judgment on plaintiffs' claims of a conspiracy between these two defendants. This court granted permission for the interlocutory appeal and consolidated it with plaintiffs' appeal.

III.

A. The Conspiracies Among the Hospitals and Their Medical Staffs

To establish a violation of section 1 of the Sherman Act, 15 U.S.C. § 1,[2] a plaintiff "must establish that the defendants combined or conspired with an intent to unreasonably restrain trade." *Smith v. Northern Mich. Hosps.*, 703 F.2d 942, 949 (6th Cir. 1983). It is crucial that a plaintiff demonstrate that there has been a contract, combination, or conspiracy between separate entities, because section 1 does not reach unilateral conduct even if such conduct unreasonably restrains trade. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). Unilateral conduct is governed by section 2 of the Sherman Act, 15 U.S.C. § 2, "and is unlawful only when it threatens actual monopolization." *Id.* Under section 1, only after the court has found that there was a conspiracy will it examine whether the conduct was unreasonable.

Congress treated concerted behavior more strictly than unilateral behavior because it

> inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers,

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[2]"Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is illegal." 15 U.S.C. § 1.

> but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Id. at 768-69.

Not every agreement or coordinated conduct between two or more entities constitutes a conspiracy under section 1. For example, under the intra-enterprise rule, a parent corporation and its wholly owned subsidiary are viewed as a single enterprise for purposes of section 1 of the Sherman Act, because

> [t]heir objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one . . . . If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Id. at 771. Similarly, an agreement between officers or employees of the same firm does not ordinarily constitute a section 1 conspiracy, because

> officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. . . .

Id. at 769. For the same reasons, a corporation cannot ordinarily conspire with its agents or employees. *See, e.g., Smith v. Northern Mich. Hosps.*, 703 F.2d 942, 950 (6th Cir. 1983). These rules have been collectively referred to as the "intracorporate conspiracy doctrine." *See, e.g.*, Handler &

Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), *cited in Copperweld*, 467 U.S. at 766 n.12.

Some courts have held that the intracorporate conspiracy doctrine does not prevent a finding of a conspiracy between a hospital and its medical staff or among the members of the medical staff, because the relationships between a medical staff and a hospital or among a medical staff are different than the relationships between a corporation and its agents or among those agents. *See, e.g., Bolt v. Halifax Hosp. Medical Center*, 851 F.2d 1273, 1280 (11th Cir.), *vacated*, 861 F.2d 1233 (11th Cir. 1988) (en banc), *reinstated in part*, 874 F.2d 755 (11th Cir. 1989) (en banc); *Weiss v. York Hosp.*, 745 F.2d 786, 813-17 (3d Cir. 1984). These courts determined that a hospital's medical staff are more than "agents" of the hospital for antitrust purposes.

The Eleventh Circuit, in *Bolt*, held that members of a medical staff must be considered to be more than just officers of a corporation and are capable of conspiring both among themselves and with the hospital. 851 F.2d at 1280. The court reasoned that members of a medical staff are capable of conspiring among themselves because each member of the medical staff, unlike an officer of a corporation, "is a separate economic entity potentially in competition with other physicians." *Id.* Furthermore, the court reasoned that the medical staff and the hospital are capable of conspiring together since "[a] hospital and the members of the medical staff, in contrast to a corporation and its agents, are legally separate entities, and consequently there is no similar danger that what is in fact unilateral activity will be bootstrapped into a 'conspiracy.' " *Id.*; *see also Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988) (adopting the reasoning of *Bolt*).

The Third Circuit, in *Weiss*, issued a more narrow holding. As in *Bolt*, the court held that the individual members of the

medical staff were capable of conspiring among themselves because they were not merely officers of the hospital but were practicing medicine in their individual capacities in competition with each other. 745 F.2d at 814-17. However, the court also held that the members of the medical staff were acting only as officers of the hospital when they made staff privilege decisions for the hospital and could not conspire with the hospital, because the medical staff was not in competition with the hospital. *Id.* at 816-17.

In addition, other courts have recognized an exception to the rule that a corporation cannot conspire with its agents or employees, and have held that such a conspiracy can exist when the employee has an independent personal stake in achieving the object of the conspiracy. *See, e.g., H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974). However, on two occasions this court, while not specifically rejecting the independent personal stake exception, has noted that "[t]here are rather substantial policy reasons for not adopting such an exception." *Potters Medical Center v. City Hosp. Ass'n*, 800 F.2d 568, 573 (6th Cir. 1986); *Smith*, 703 F.2d at 950 n.15.

In this case, the district court held that, under the intracorporate conspiracy doctrine, there could be no conspiracy between HCH and its medical staff or SHH and its medical staff.[3] Relying on *Potters* and *Smith*, the court declined to adopt the independent personal stake exception.

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[3]In so holding, the district court cited to, and quoted extensively from, the portion of the Third Circuit's opinion in *Weiss* that held that a hospital could not conspire with its medical staff since they were not competitors. However, the court did not discuss the portion of the *Weiss* opinion in which the court of appeals held that the individual members of a hospital's medical staff could conspire with each other when making a staff privileges recommendation.

Plaintiffs contend that the district court erred in concluding that the intracorporate conspiracy doctrine dictated that there could be no antitrust conspiracy between a hospital and its medical staff. They first argue that the doctrine does not apply because the defendant members of the medical staff are not agents of the hospital. They also contend that, even if the doctors are agents of the hospital, they are still capable of conspiring with the hospital under the independent personal stake exception.

1. *The Agency Status of the Medical Staffs*

The issue whether the individual members of a hospital's medical staff should be treated as agents of the hospital for antitrust purposes when making a recommendation concerning an application for staff privileges is a difficult one. Under traditional concepts of agency, members of a hospital's medical staff who, acting at the hospital's request, make a recommendation concerning an application for privileges ordinarily would be acting as agents for the hospital. It is certainly legitimate for a hospital to seek advice from its medical staff concerning the competence of a person seeking privileges at the hospital and the risks that may be incurred by the hospital if privileges were granted. On the other hand, the premise underlying the intracorporate conspiracy doctrine, that agents of a firm share a unity of economic purpose with the firm, does not necessarily apply when viewing the relationship between a hospital and its medical staff. The members of a medical staff are not salaried employees of the hospital but are independent medical practitioners, some in direct competition with each other and with applicants for privileges. There is certainly some danger of anticompetitive decision-making when a group of physicians recommends to the hospital that an applicant who is in competition with those physicians be denied privileges at the hospital.

For the most part, the Third Circuit's reasoning in *Weiss* seems to best achieve the objectives of the Sherman Act.

Accordingly, the intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff but, in certain situations, does not preclude a conspiracy among individual members of the medical staff. Section 1 of the Sherman Act is concerned only with concerted action among competitors and not the coordinated activities that occur within a single firm. As the *Weiss* court held, when determining whether the intracorporate conspiracy doctrine applies to an alleged conspiracy between a hospital and its medical staff, there are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and the medical staff are not competitors. The fact that the medical staff may have acted with anticompetitive motives is not sufficient to warrant a finding that a hospital's decision to accept the staff recommendation is an antitrust conspiracy.

In contrast, the individual members of a hospital's medical staff are in many cases direct competitors with each other. We do not, however, agree with the *Weiss* court's conclusion that a hospital's medical staff can never be considered a single economic entity for purposes of antitrust analysis. The fact that medical staff members may be in competition with each other does not mean that every decision of the medical staff warrants scrutiny under section 1 of the Sherman Act. When the staff as a group makes decisions or recommendations for the hospital in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital. However, when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members.[4]

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[4]This position is not inconsistent with reported opinions of this court. In *Potters*, the court found only that the intracorporate conspir-

It remains then to apply these principles to the facts in this case. With respect to the allegations that HCH and SHH conspired with their respective medical staffs, for the reasons stated above, we conclude that the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.

In addition, with respect to the allegation that Dr. Shackleford conspired with the other pediatricians on the HCH medical staff, we find that Dr. Shackleford was acting as an agent of HCH. Although Dr. Shackleford is a competitor of the other pediatricians on the HCH medical staff, their actions regarding plaintiffs' application for privileges at HCH do not relate to the market in which they compete as individuals since NMA competes with obstetricians, not pediatricians. Accordingly, the intracorporate conspiracy doctrine also applies to this allegation.

We believe, however, that with respect to the allegation that Drs. Melkin, Baer, and Andrews conspired with each other and other members of the SHH medical staff, the district court erred in concluding that Drs. Melkin, Baer, and Andrews were agents of SHH. These doctors are competing obstetricians alleged to have joined together to cause SHH to deny privileges to a competitor and, therefore, are not agents of SHH for purposes of applying the intracorporate conspiracy doctrine.

2. *The Independent Personal Stake Exception*

Having concluded that the intracorporate conspiracy doctrine governs plaintiffs' allegations that the medical staffs

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acy doctrine prevented a finding that a hospital conspired with a member of its medical staff. 800 F.2d at 573. In *Smith*, the court held that there could be no conspiracy among a number of physicians operating in a group practice. The court emphasized that the physicians were not independent practitioners competing among themselves but were members of a professional corporation operating toward one economic goal. 703 F.2d at 950-51.

conspired with the hospitals, we must next determine whether to consider the circumstances under the independent personal stake exception, as urged by plaintiffs. We are not inclined at this point to follow several other circuits in adopting this exception in view of substantial policy reasons for not doing so. *Smith*, 703 F.2d at 950. We are not convinced that an agent acting with anticompetitive motives due to some independent personal stake raises sufficient antitrust concerns to warrant abandoning the traditional rule that a principal cannot conspire with one of its agents. *See also* P. Areeda, *Antitrust Law* ¶ 1471 (1986). Accordingly, we believe that the district court correctly granted summary judgment in favor of defendants HCH, SHH, and Dr. Shackleford.

B. Conspiracy Among Members of SVMIC

One of the means the defendant physicians allegedly used to prevent a qualified obstetrician from cooperating with nurse midwives was for Dr. Hibbett and physician members of SVMIC to cancel Dr. Martin's malpractice insurance because of his contract with nurse midwives.

On this claim, the district court granted summary judgment in favor of defendant SVMIC, holding that SVMIC must be viewed as a single entity when it decided to terminate Dr. Martin's coverage. In doing so, the court reversed the position it had previously taken in denying SVMIC's motion to dismiss. *See Nurse Midwifery Assocs. v. Hibbett*, 549 F. Supp. 1185 (M.D. Tenn. 1982). In that earlier decision, the district court thought that

> the existence of concerted action by a single corporation such as SVMIC is not, as a matter of law, precluded. Because SVMIC is owned and operated exclusively by its physician policyholders, who have elected a Board of Directors also dominated by physicians, and is closely affiliated with the Tennessee Medical Association, SVMIC may be considered

> capable of concerted action. . . . Indeed, in view of the member control of SVMIC, SVMIC may be considered the agent of its physician policyholders. . . .

Id. at 1190 (citations omitted).

But, in reversing itself, the district court pointed to *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982). In that case, the Supreme Court held that an agreement among competing physicians which set, by majority vote, maximum fees that they would accept as full payment for services provided for patients insured by approved insurers was per se unlawful under section 1 as a horizontal price-fixing conspiracy. In distinguishing the "foundations" set up by the physicians to administer the agreement from other entities to which it had not applied the per se rule, the Supreme Court utilized the language relied upon by the district court:

> Each of the foundations is composed of individual practitioners who compete with one another for patients. Neither the foundations nor the doctors sell insurance, and they derive no profits from the sale of health insurance policies. The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product. Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care.
>
> The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is an agreement among hundreds of compet-

> ing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold.

Id. at 356-57.

On its face, this language would appear to support the district court's apparent conclusion that, when the competing physicians joined together to sell malpractice insurance—a product different from the medical services over which they normally competed among themselves and with other providers—they operated as a single entity pursuing a complete unity of interest, rather than as the independent actors essential to the existence of a conspiracy. That reasoning would be persuasive if the selling of the different product had triggered a complaint that the defendants were restraining competition among sellers of malpractice insurance. But, here, plaintiffs allege that the anti-competitive effect of defendants' conduct is in the same area in which the physicians combining to form SVMIC usually compete—providing medical services. If these allegations are true, then the defendants' conduct cannot be characterized as that of former competitors operating a joint venture which competes in the market with other sellers of malpractice insurance. Instead, it will be the conduct of physicians who retain their identity as individuals who compete among themselves and with plaintiffs in providing maternity care services and combine to unreasonably

restrain competition in that field by denying malpractice insurance coverage to a competing maternity care provider.

Accordingly, the language quoted from *Maricopa* does not compel the conclusion arrived at by the district court that, as a matter of law, "SMVIC [sic] must be viewed as a single entity." Since SVMIC and its members were theoretically capable of conspiring, the question remains upon remand whether physicians who had previously pursued their own interests separately, in this instance combined to unlawfully restrain competition among providers of maternity care.

C. Conspiracy Between Dr. Hibbett and Vanderbilt

A plaintiff in an antitrust suit need not introduce any direct evidence of an alleged conspiracy. "[B]usiness behavior is admissible circumstantial evidence from which the fact-finder may infer agreement." *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954). A conspiracy can be established by showing that business behavior evidenced "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 320 U.S. 781, 810 (1946).

However, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). The fact that a group of defendants' conduct is consistent with an illegal conspiracy does not, in itself, support an inference of antitrust conspiracy. *Id.*; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). For a jury to be able to reasonably infer that an illegal conspiracy existed, a plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto*, 465 U.S. at 764).

The district court found that plaintiff had produced circumstantial evidence demonstrating that Vanderbilt's and Dr. Hibbett's conduct was consistent with an illegal conspiracy. The court noted that plaintiffs had introduced evidence (1) that Vanderbilt and Dr. Hibbett had an opportunity to conspire and (2) of a motive on Vanderbilt's part to conspire with Dr. Hibbett, namely, a desire to maintain its advantageous relationship with Baptist Hospital, a hospital at which Dr. Hibbett had some influence. However, the district court also found that the conduct alleged was equally consistent with the hypothesis that Vanderbilt denied plaintiffs' applications for independent business reasons, "namely the promotion of Vanderbilt as a tertiary care center and a high quality medical education and residency training institution." The court found, therefore, that summary judgment in favor of Dr. Hibbett was warranted on this claim.

Plaintiffs contend that the district court erred in granting summary judgment to Dr. Hibbett. In support of this argument, they emphasize the evidence demonstrating that Dr. Hibbett, an avowed opponent of nurse midwives, had discussions with members of the medical staff of Vanderbilt and that Vanderbilt had great incentive to accommodate Dr. Hibbett's views due to his relationship with Baptist Hospital. Plaintiffs do not, however, explain how their evidence "tends to exclude the possibility" that Vanderbilt denied the nurse midwives' applications for the reasons it gave them: (1) that its staff members had historically been employees of the institution; and (2) that Vanderbilt's commitment to tertiary care made it inappropriate for the hospital to grant privileges to nurse midwives. Plaintiffs argue that such evidence is unnecessary because "it is clear from a review of the relevant cases on the use of business behavior as circumstantial evidence of an agreement that no uniformity exists as to its necessary components." This argument is without merit given the clear pronouncements in *Monsanto* and *Matsushita*. Accordingly, the district court did not err in granting summary judgment

on the claims concerning an alleged conspiracy between Vanderbilt and Dr. Hibbett.

D. Conspiracy Between SHH and HCH

The district court denied summary judgment on plaintiffs' claim that SHH and HCH had conspired together. The court did not find any direct evidence of any conspiracy but found that the circumstantial evidence of parallel business activity was sufficient to allow the claim to go to the jury. HCH and SHH contend that there is no evidence that their actions were parallel, that they had no incentive to conspire, and that their decisions were not contrary to their independent self-interests.

While this court reviews a grant of summary judgment under a de novo standard, appellate review of a denial of summary judgment is governed by an abuse of discretion standard. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988). After reviewing the relevant facts, we are unable to say that the district court abused its discretion in denying summary judgment.

IV.

For the reasons stated, we **reverse** the district court's decision granting summary judgment in favor of SVMIC and of Drs. Melkin, Baer, and Andrews and **affirm** the decision in all other respects. This case is **remanded** for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

NURSE MIDWIFERY ASSOCIATES, ET AL.	)	
VS.	)	DOCKET NO. 82-3208
B.K. HIBBETT, M.D., ET AL.	)	

MEMORANDUM

The Court has received the Report and Recommendation issued by the Magistrate on July 31, 1987, concerning motions for summary judgment filed by each of the defendants in this case. Plaintiffs and certain defendants have filed written objections to the Report and Recommendation. Under Rule 72(b) of the Federal Rules of Civil Procedure, the Court must make a *de novo* determination of all matters to which the parties object. In its determination, the Court may adopt, modify, or reject any of the Magistrate's proposed findings or recommendations.

This is an antitrust action for injunctive relief and damages based upon sections 1 and 2 of the Sherman Anti-Trust Act ("the Act"), 15 U.S.C. §§ 1-7, and pendent state law claims. The plaintiffs are: two nurse midwives, Susan Sizemore and Victoria Henderson; their business partnership, Nurse Midwifery Associates ("NMA"); their physician associate, Dr.

Darrell Martin; and several NMA clients. The defendant are: Vanderbilt Hospital ("Vanderbilt"); Hendersonville Community Hospital ("HCH"); Dr. Conrad Shackleford, a member of the pediatric staff at HCH; Southern Hills Hospital ("SHH"); Drs. Stephen Melkin, Harry Baer, and George Andrews, members of the obstetrics staff at SHH; State Volunteer Mutual Insurance Company ("SVMIC"); and Dr. B.K. Hibbett, a member of the obstetrics staff at Baptist Hospital in Nashville, and also a member of the SVMIC board of directors. Broadly stated, plaintiffs claim that the defendant doctors, hospitals, and insurance company engaged in various contracts, combinations and conspiracies that unreasonably restrained trade in violation of section 1 of the Act, and attempted to monopolize trade in violation of section 2 of the Act. Plaintiffs allege that defendants intended to prevent NMA from operating a private practice to provide nurse midwifery services at hospitals in Davidson County and Hendersonville, Tennessee, thus putting NMA out of business.

Having reviewed the record, including the Report and Recommendation, the objections thereto, and the responses to those objections, the Court ADOPTS the Magistrate's extensive findings of fact and incorporates them into this Memorandum.

To survive a summary judgment motion in an antitrust case, a plaintiff "must establish that there is a genuine issue of material fact" as to whether the defendants "entered into an illegal conspiracy that caused [the plaintiffs] to suffer a cogni-

zable injury." *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986) (citing, *inter alia*, Fed. R. Civ. P. 56(e)). With this standard in mind, the Court now considers the Magistrate's recommendation as to each allegation and makes a *de novo* determination of recommendations to which objections have been filed.

1. Conspiracy Among Vanderbilt and Members of its Medical Faculty

Based on the facts set out in the Report and Recommendation, plaintiffs allege that Vanderbilt should be held liable for conspiring with members of its medical faculty to deny plaintiff nurse midwives medical staff privileges at that hospital. The Magistrate recommended that all allegations of conspiracy among Vanderbilt and any members of its full-time faculty be dismissed. For the reasons stated below, the Court ADOPTS the Magistrate's recommendation and reasoning as to this claim.

Section 1 of the Act prohibits all contracts, combinations, or conspiracies in restraint of trade. Section 2 of the Act prohibits all combinations or conspiracies to monopolize. Because these activities cannot be performed by a single person acting alone, it is well established that two or more persons are necessary to perform an actionable contract, combination, or conspiracy under the Act. *See, e.g.*, 2 Kintner, *Federal Antitrust Law* § 9.7 (1980). It is also well established that unilateral action, no matter what its

motivation, does not violate the Act. *See Monsanto Co. v. Sprayrite Service Corp.*, 465 U.S. 752, 761 (1984); *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

A corporation cannot combine or conspire with itself, and the acts of a corporation alone, acting through its directors, officers, and employees, generally are not cognizable under the Act. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). If this were not the rule, every decision of a corporation on pricing, marketing, and customer relations would be the result of a conspiracy actionable under the Act.

In *Weiss v. York Hospital*, 745 F.2d 786, 816-17 (3d Cir. 1984), *cert denied*, 470 U.S. 1060 (1985), the Third Circuit held that a medical staff of a hospital cannot conspire with the hospital. The Court stated:

> Finally, we deal with the plaintiff's assertion that the district court erred in charging the jury that the hospital could not conspire with its medical staff. The district court found that the medical staff was an unincorporated division of the hospital, and as such the court determined that the two could not conspire. Although we do not necessarily agree with the district court's characterization of the medical staff as an unincorporated division of the hospital, we agree with its basic conclu-

> sion that, with respect to the issues in this case, the hospital could not, as a matter of law, conspire with the medical staff. The medical staff was empowered to make staff privilege decisions on behalf of the hospital. As such, with regard to these decisions, the medical staff operated as an officer of a corporation would in relation to the corporation. Although the members of the medical staff had independent economic interests in competition with each other, the staff as an entity had no interest in competition with the hospital. Accordingly, we conclude that the district court correctly charged the jury that there could not be a conspiracy between the hospital and the medical staff.

See also McMorris v. Williamsport Hospital, 597 F. Supp. 899, 914 (M.D. Pa. 1984). Likewise, Vanderbilt argues that plaintiffs' claim must fail because they allege only intra-corporate conspiracy.

Plaintiffs argue in response that Weiss states merely that a medical staff cannot conspire with a hospital where the staff has no interest in competition with the hospital. Plaintiffs argue that the individual members of the medical faculty had an "independent personal stake" separate from Vanderbilt's and, thus, could conspire with the hospital. Plaintiffs cite the only known case finding the possibility of an independent personal stake in

hospital privilege case, Robinson v. Magovern, 521 F. Supp. 842 (W.D. Pa. 1981), aff'd, 688 F.2d 842 (3d Cir.), cert. denied, 459 U.S. 971 (1982). There, the court found that a conspiracy between a hospital and the head of its surgery department would be possible where "the officer, agent or employee has an independent, personal stake in achieving the object of the conspiracy." *Id.* at 907.

The head of the hospital surgery department in *Robinson* also conducted a private surgical practice, which in that court's view provided an independent personal stake. Plaintiffs argue that, likewise, Vanderbilt's medical staff maintained private practices in addition to their duties at the hospital.

The independent personal stake exception relied upon by plaintiffs has never been adopted by the Sixth Circuit, which has expressed disfavor with the exception in the only two instances in which it has been argued to that court. In *Smith v. Northern Michigan Hospitals*, 703 F.2d 942 (6th Cir. 1983), the court found that the individual hospital emergency room staff personnel did not have an independent personal stake separate from the hospital, but that even if they did, "it is doubtful that we would follow the analysis" of the independent personal stake exception. *Id.* at 951 n.17.

In *Potters Medical Center v. City Hospital Administration*, 800 F.2d 568 (6th Cir. 1986), the court went even further in voicing its reluctance to adopt the excep-

tion. In *Potters*, plaintiffs alleged that the hospital's staff attorney and its internal medicine department chairman had conspired with each other and with the hospital in violation of the Act. The staff attorney also owned an interest in a construction company that did work for the hospital, and the staff physician also received revenue from the hospital's use of EKG equipment that he owned. The plaintiffs in *Potters* argued that these interests gave these defendants an independent personal stake in harming plaintiffs and in furthering the alleged monopolistic goals of the hospital. The court stated:

> Although several courts have recognized the "independent personal stake" exception to the rule that officers and agents lack capacity to conspire with their corporation,. . .this circuit has never endorsed the exception. In fact, this court has noted the "rather substantial policy reasons for not adopting such an exception."

Id. at 573 (citing *Smith*, 703 F.2d at 950 n.15); *see* Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1981-82) (discussing policy considerations bearing on the intracorporate conspiracy doctrine).

Given the clear language of *Potters*, this Court is constrained to agree with the Magistrate that the Sixth Circuit does not intend to recognize the existence of the independent personal stake exception in

this circuit. In the absence of that recognition, allegations of intra-corporate conspiracy against Vanderbilt must be dismissed.[1]

The Court further agrees with the Magistrate that even if the Sixth Circuit were to recognize this exception, plaintiffs' argument still would fail. As an exception is applied elsewhere, an independent personal stake exists only when an employee of a corporation has an interest in an economic entity that is separate from and unrelated to the corporation by which he is employed, and when that employee stands to benefit from the anti-competitive action taken by the corporate employer. *See H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978). A mere potential or indirect motive would be too speculative a basis from which to infer an independent personal stake. *Potters*, 800 F.2d at 573; *Smith*, 703 F.2d at 951. Furthermore, the employee would have to possess the power to institute an anti-competitive policy for his corporation. *Potters*, 800 F.2d at 573; *see also Greenville Publishing Co. v. Daily Reflector*, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974).

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[1]. This Court's earlier determination to the contrary in *Nurse Midwifery Associates v. B.K. Hibbett*, 549 F. Supp. 1185, 1189-90 (M.D. Tenn. 1982), was rendered before the Sixth Circuit's pronouncements in *Smith* and *Potters*.

Under the facts as stated in the Report and Recommendation, the success of the corporate entity, Vanderbilt, depends upon the success of the individual doctors, and vice versa. Because the success of the clinic practice of the individuals is so closely tied to that of Vanderbilt itself, the Court agrees with the Magistrate that any other possible motive would be too speculative to form the basis of an independent personal stake, even if the exception were recognized by the Sixth Circuit. In this regard, the alleged independent personal stake of the physicians at Vanderbilt is similar to those rejected by the courts in *H & B Equipment*, 577 F.2d at 239, and *Wahl v. Rexnord, Inc.*, 481 F. Supp. 573 (D.N.J. 1979), *rev'd on other grounds*, 624 F.2d 1169 (3d Cir. 1980) (no conspiracy between corporation and its president, who held a patent licensed by the corporation). In addition, the Court further agrees with the Magistrate that Vanderbilt's medical staff by-laws, which required non-physicians applying for the medical staff to be employees of Vanderbilt with faculty appointments in the School of Medicine, were not the cause in fact of plaintiffs' alleged injuries. In any case, the by-laws were, at most, the product of an intra-corporate conspiracy. Accordingly, the Court ADOPTS the recommendation to enter summary judgment for defendant Vanderbilt on this claim, and hereby DISMISSES plaintiffs' allegation of conspiracy among Vanderbilt and any members of its medical staff.

2. Conspiracy Between HCH and Dr. Shackleford

Plaintiffs allege that defendants HCH and Dr. Shackleford should be held liable for conspiring to deny plaintiff midwives privileges at that hospital. The Magistrate recommended that all allegations of conspiracy between HCH and Dr. Shackleford or any other member of HCH's medical staff be dismissed.

The facts presented indicate, at most, an intra-corporate conspiracy between these defendants. As noted above, the unilateral actions of a corporation acting through its employees generally do not constitute a conspiracy under the Act, *see Copperweld*, 467 U.S. at 752; *Weiss*, 745 F.2d at 786, and the Sixth Circuit does not recognize the independent personal stake exception to this general rule, *see Potters*, 800 F.2d at 568. In addition, even if the exception were available, the Court again agrees with the Magistrate that this claim would fail. Although defendant Shackleford's private practice arguably may have given him an independent personal stake in achieving the object of the alleged conspiracy, the facts do not show that he possessed or exercised the power to institute an anti-competitive policy for HCH, a requisite element under the exception where applied. *See, e.g., Potters*, 800 F.2d at 573; *Greenville Publishing*, 496 F.2d at 391. Therefore, the Court hereby ADOPTS the Magistrate's recommendation to enter summary judgment for defendants HCH and Dr. Shackleford on this allegation, and DISMISSES plaintiffs' claim of conspiracy between HCH and Dr.

Shackleford or any other member of HCH's medical staff.

3. Conspiracy Among SHH and Drs. Melkin, Baer, and Andrews

Plaintiffs allege that defendants SHH, Melkin, Baer, and Andrews should be held liable for conspiring to deny plaintiff nurse midwives privileges at that hospital. The Magistrate recommended that all allegations of conspiracy among SHH and its employees, including Melkin, Baer, and Andrews, be dismissed.

Again, the facts indicate, at most, merely an intra-corporate conspiracy, which is not cognizable under the Act in this circuit. *See Copperweld*, 467 U.S. at 752. Even if the private medical practices of the individual defendant doctors arguable gave them an independent personal stake in the object of the alleged conspiracy, this exception is not available to plaintiffs. *Potters*, 800 F.2d at 568. In any case, the claim would fail because the individual defendants did not possess the power to effect an anti-competitive policy at SHH. Therefore, the Court ADOPTS the Magistrate's recommendation to enter summary judgment for defendants SHH and Drs. Melkin, Baer, and Andrews on this claim. Accordingly, the Court DISMISSES plaintiffs' allegations of conspiracy among SHH and Drs. Melkin, Baer, and Andrews, or any other member of SHH's medical staff.

4. Conspiracy Between SVMIC and Dr. Hibbett

Plaintiffs further allege an illegal conspiracy among principals at SVMIC, a mutual insurance company, and between SVMIC and Dr. Hibbett, to deny plaintiff Dr. Martin's renewal of his medical malpractice insurance coverage. The Magistrate recommended that all allegations of conspiracy between SVMIC and Dr. Hibbett, a member of the board of directors of SVMIC, or any other board member, be dismissed, along with all allegations regarding SVMIC's decision not to renew Dr. Martin's insurance in 1980.

The Magistrate reasoned that the acts of SVMIC and Dr. Hibbett were merely intracorporate, and not the products of concerted action under the Act. Although this Court earlier stated that SVMIC may be capable of concerted action because it is owned and operated exclusively by its physician policyholders, *Nurse Midwifery*, 549 F. Supp. at 1190, it is compelled to agree with the Magistrate in light of the nearly contemporaneous opinion in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Discussing "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss," the Supreme Court stated that "[i]n such joint ventures the partnership is regarded as a single firm competing with other sellers in the market." *Id.* at 356. The Court concluded that physicians' joint arrangements to sell insurance, which is a "different product" from the medical ser-

vices offered by physicians in their individual capacity, are single entities for antitrust analysis. *Id.* Thus, in the instant case, SMVIC must be viewed as a single entity. It follows that actions between SMVIC and Dr. Hibbett, its board member and agent, are not cognizable as a conspiracy under the Act. *See Copperweld*, 467 U.S. at 752. Although this Court earlier ruled that a sufficient basis exists for finding an independent personal stake on the part of Dr. Hibbett in having Dr. Martin's malpractice insurance coverage canceled, *Nurse Midwifery*, 549 F. Supp. 1190, this fact is irrelevant in light of the Sixth Circuit's refusal to recognize that exception. *See Potters*, 800 F.2d at 568. In addition, the Court agrees with the Magistrate that plaintiffs have failed to show that Dr. Hibbett had the power to institute the decision to cancel the insurance.

The Court further agrees with the Magistrate that even if SVMIC's actions had violated the Act, plaintiffs' claim would fail. A private plaintiff may not recover damages simply by providing a violation of the antitrust law. *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981) Rather, the plaintiff must demonstrate "a causal connection between the antitrust violation and the damages suffered." *Id.*; *see also Englander Motors, Inc. v. Ford Motor Co.*, 267 F.2d 11, 15 (6th Cir. 1959). As the Sixth Circuit has observed, "the casual link must be proved as a matter of fact and with a fair degree of certainty. . . . To be one of several

causes is not enough." *Shreve Equipment*, 650 F.2d at 105 (citations omitted).

The record establishes that despite the cancellation of malpractice insurance by SVMIC, Dr. Martin could have sought coverage from another carrier. Thus, Dr. Martin's alleged injury was caused by his own failure to seek other coverage, not by the cancellation. *See, McClure v. Undersea Industries, Inc.*, 671 F.2d 1287 (11th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983) (plaintiff equipment dealer was not injured by alleged boycott by manufacturer, because dealer was able to purchase equipment at comparable cost from other dealers). In addition, the record further establishes that Dr. Martin had decided to leave Tennessee before he had exhausted his appeal of the cancellation. Because the Court agrees that the alleged actions were unilateral, and in any case did not proximately cause plaintiff's alleged injury, it hereby ADOPTS the Magistrate's recommendation to enter summary judgment for defendants SVMIC and Dr. Hibbett on this claim, and DISMISSES plaintiffs' allegations of conspiracy between SVMIC and Dr. Hibbett, or any other board member of SVMIC.

5. Conspiracy Between Vanderbilt and Dr. Hibbett

Plaintiffs allege that defendant Vanderbilt conspired with defendant Dr. Hibbett in July 1980 to deny plaintiff nurse midwives allied medical staff privileges at the hospital. The Magistrate recommended that summary judgment be denied on this claim, concluding that sufficient

evidence exists to warrant submission of the question of conspiracy to a jury.

Although plaintiffs have presented no direct evidence of this alleged conspiracy, "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954). Conspiracy can be established by showing business behavior evidencing "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 534-35 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975) ("In nearly all cases in which a combination or conspiracy is established through circumstantial evidence, the alleged conspirators have engaged in conduct which is in some sense congruent, compatible, or harmonious.").

On summary judgment, the inference to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *see also Potters*, 800 F.2d at 572. However, as the Supreme Court has stated:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence. . . . Thus, in *Monsanto Co. v. Spray-Rite*

> *Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.* at 764, 104 S.Ct., at 1470. . . . To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages. . .must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764, 104 S.Ct., at 1471. Respondents, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

Matsushita, 475 U.S. at 588; *see also Potters*, 800 F.2d at 572.

In the instant case, Vanderbilt may be found liable, under the theory of *respondeat superior* or vicarious liability, for any alleged violations of the Act attributable to actions of any medical staff member in conspiring with Dr. Hibbett. *See American Society of Mechanical Engineers, Inc. v. Hydorlevel Corp.*, 456 U.S. 556, 565-68 (1982). A conspiracy may be found when one party acquiesces in the anti-competitive demand of another, even if the agreement is obtained through coercion. *See e.g., Albrecht v. Herald Co.*, 390 U.S. 145

(1968). This appears to be the essence of plaintiffs' claim. Turning to the record in this case, the Court notes that plaintiffs rely upon two types of circumstantial evidence: (1) evidence of an opportunity for Vanderbilt and Dr. Hibbett to conspire, and (2) evidence of a motive on Vanderbilt's part, namely to maintain its advantageous relationships with Baptist Hospital, at which Dr. Hibbett, an opponent of nurse midwifery, was an influential staff member, and with the local OB/GYN community generally, as discussed in the Report and Recommendation. Specifically, Dr. Hibbett allegedly had conversations with Vanderbilt staff members in July 1980 at which they may have conspired regarding denial of plaintiffs' privileges at Vanderbilt. Defendants deny ever having had such conversations concerning plaintiffs or the subject of midwifery.

Having reviewed the record in light of the standard enunciated in *Matsushita*, the Court finds that the conduct alleged is as consistent with permissible individual conduct as with illegal conspiracy. Because the evidence does not tend to exclude the possibility of independent action, the inference of conspiracy between the defendants is not reasonable in light of the competing inferences.

First, Vanderbilt has asserted the plaintiffs' applications were denied for independent business reasons, namely the promotion of Vanderbilt as a tertiary care center and a high quality medical education and residency training institution. Vanderbilt's explanation that nurse mid-

wifery did not fit readily into this program is both plausible and logical. If the nonmoving party's innocent explanation of the questioned conduct is plausible and more logical than a concerted action theory, summary judgment against the moving party is appropriate. *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 (D.C. Cir. 1984).

Second, the federal courts consistently have recognized that "mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anti-competitive conspiracy" to deny hospital privileges. *Cooper v. Forsyth County Hospital Authority, Inc.*, 789 F.2d 278, 281 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 474 (1986); *see, e.g., Kaczanowski v. Medical Center Hospital of Vermont*, 612 F. Supp. 688, 695 (D.C. Vt. 1985). As the court stated in *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975):

> While the jury was free to disregard the defendants' testimony that no agreement of any kind was formulated during the course of these contacts, mere disbelief could not rise to the level of positive proof of agreement to sustain plaintiffs' burden of proving conspiracy. Furthermore, while proof of contracts between the [defendants] during the crucial summer period may demonstrate the opportunity for formation of a conspiracy, such

> an opportunity is significant only if other evidence permits an inference that an agreement did in fact exist. Thus, it is necessary to review plaintiffs' other evidence before the importance of the contacts between defendants and the inferences the jury might legitimately draw therefrom may be determined.

Given the independent business motive states by Vanderbilt, the mere opportunity to conspire during the alleged conversations does not warrant the inference of conspiracy. Moreover, the Court notes that even if the alleged July 1980 conversations between Dr. Hibbett and the Vanderbilt staff members had concerned plaintiffs' applications, the decision to deny the applications, although announced in September 1980, appears to have been made earlier in June 1980, before the alleged conversations would have occurred. *See Vanderbilt's Memorandum in Support, at Exhibit 5.*

For these reasons, the Court DOES NOT ADOPT the Magistrate's recommendation to deny defendants' motion. Accordingly, the Court ENTERS summary judgment for defendants on this claim, and DISMISSES plaintiffs' allegations of conspiracy between these defendants.

6. Conspiracy between SHH and HCH

Plaintiffs also allege that a conspiracy between SHH and HCH to deny plaintiff nurse midwives privileges at these hospi-

tals can be inferred from their parallel business activity. The Magistrate recommended that these defendants' motion for summary judgment on this claim be denied because a genuine issue of material fact exists regarding the inference of a conspiracy.

The parties have not cited, and the Court has not found, any Sixth Circuit precedent establishing the requisite elements for proving antitrust conspiracy by circumstantial evidence of parallel business activity. However, under the majority rule, which the Court adopts, the plaintiffs must show that (1) the alleged conspirators' business activities constituted parallel conduct; (2) the alleged conspirators had a motivation to enter into a conspiracy; and (3) the actions taken were contrary to the alleged conspirators' individual economic interests. *See, e.g., Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.12 (D.C. Cir. 1984); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975); P. Areeda, *Antitrust Law* §1434c2 (1986). As noted earlier, these two hospitals may be found liable, under the theory of *respondeat superior* or vicarious liability, for any violations of the Act attributable to the actions of any members of their medical staffs. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565-68 (1982). Turning to the facts as summarized in the Report and Recommendation, the Court agrees with the Magistrate that sufficient genuine issues of material fact are presented to warrant denial of

summary judgment. First, the two hospitals' actions were arguably parallel in that the hospitals were in similar situations and took strikingly similar actions within a short time of each other concerning the applications for privileges. Defendants contend that for such parallel behavior to be cognizable, plaintiffs must show "that the defendants were conscious of each other's conduct and that their awareness was an element in their decisional process." *Schoenkoff v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir. 1980). The Court concludes that because plaintiffs, in their application to SHH, described the events surrounding their applications at HCH, a sufficient showing has been made as to this element.

Second, plaintiffs have shown motivation to conspire on the part of the hospitals sufficient to survive a summary judgment motion. Plaintiffs' claim is that the hospitals intended to satisfy the objectives of certain members of their respective medical staffs not to allow plaintiffs to compete with local physicians. This contention is supported by evidence, discussed in the Magistrate's Report and Recommendation, of the decisionmaking process at the hospitals in denying the applications, in light of certain doctors' hostility toward midwifery and the hospitals' initial receptiveness to plaintiffs' proposals.

Third, the Court agrees with the Magistrate that the hospitals' actions arguably were against their individual economic interests. As the Magistrate

noted, the anticipated yearly number of deliveries attributable to plaintiffs' proposed practice would have increased significantly the hospitals' occupancy rates and, presumably, their revenues. Thus, the Court ADOPTS the Magistrate's recommendation and DENIES summary judgment to defendants SHH and HCH on this claim.

7. Tying by Vanderbilt

Plaintiffs contend that Vanderbilt engaged in a tying arrangement in violation of the Act by requiring its hospital maternity patients to use physician maternity services. According to plaintiffs, the "tying" product is in-hospital maternity services, and the "tied" product is physicians' services. The relevant geographic market alleged by plaintiffs is Davidson County and Hendersonville, Tennessee. The Magistrate recommended that Vanderbilt's motion for summary judgment on this claim be denied.

The elements of a *per se* illegal tying arrangement are: 1) that there are two separate and distinct products; 2) that the seller has sufficient economic power in the tying product market; and 3) that the tying involves a "not insubstantial" amount of commerce. *See, e.g.*, 2 Kintner, *Federal Antitrust Law* 10.53. Moreover, under the "rule of reason" analysis, another element is added -- that the tying arrangement had anti-competitive effects in the marketplace. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984). Thus, in order to establish an illegal tying arrangement under either the

per se or the "rule of reason" analysis, plaintiffs first must establish that Vanderbilt sufficient market power over in-hospital maternity services in Davidson County and Hendersonville to force patients to accept physicians' services. *See, e.g., Hyde*, 466 U.S. at 13-14.

Market power may be proven by showing that the firm offers a unique product that competitors are not able to offer. Where market power can be demonstrated by the uniqueness of a particular product, market dominance is not required. *United States v. Lowe's*, 371 U.S. 38, 45 (1962).

For antitrust purposes, the tying product's uniqueness is established by determining

> whether the seller has the power, within the market for the tying product,. . .to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II), 429 U.S. 610, 620 (1977). The Court continued:

> Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product

> themselves. Such barriers may be legal, as in the case of patented and copyrighted products,. . .or physical, as when the product is land. . . . It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it.

Id. at 621 (quoting *Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I)*, 394 U.S 495, 505 n.2 (1969) (citations omitted)).

Thus, under *Fortner II*, uniqueness only can be established by showing either "(1) a cost advantage on the part of the seller, or (2) a characteristic of the tying product that significantly differentiates it from that which competitors could offer if they so elected. A special advantage must be shown to establish uniqueness and economic power." 2 Kintner, *Federal Antitrust Law* § 10.56.

Plaintiffs argue that, as of the date of the nurse midwives' applications, Vanderbilt was one of three hospitals in the relevant area that offered a unique obstetrical service, family centered maternity care. The other maternity care requires a particular combination of facility utilization, obstetrical policies, and

personnel. Only Vanderbilt, SHH, and HCH offered this particular combination of facilities, policies, and personnel in 1980 in the relevant geographic area. Thus, plaintiffs base their tying theory on the alleged uniqueness of family centered maternity care in this market.

However, plaintiffs have made no showing that other competitors were in some way prevented from offering family centered maternity care because of legal, physical, or economic barriers. In short, plaintiffs have shown no cost advantage to Vanderbilt or any characteristic of family centered maternity care that significantly differentiates it from that which competitors could offer if they so elected.

The record shows that two other hospitals, SHH and HCH, both provided this "unique" product. While the record further shows that other hospitals with maternity units in the relevant area did not provide all the components that plaintiffs allege are necessary for family centered maternity care, plaintiffs have not offered any evidence as to why these other hospitals did not. Evidence that other hospitals were prevented from offering this product is critical to plaintiffs' claim. In the absence of proof, it cannot be assumed that these hospitals desired to provide the product but for one reason or another were thwarted from doing so. Hospitals make their own decisions concerning room usage, policies, and personnel. No reason has been presented to believe that the other hospitals in the geographic area could not adopt these policies and, thus, also offer

family centered maternity care. Absent such proof, uniqueness has not been established. Plaintiffs, therefore, have failed to present facts to show that Vanderbilt possessed sufficient market power, a requisite element under the theory of illegal tying. For this reason, the Court DOES NOT ADOPT the Magistrate's recommendation to deny defendant Vanderbilt's motion. Accordingly, the Court ENTERS summary judgment for defendant Vanderbilt on this claim, and DISMISSES this claim from this action.

8. Pendent State Claims

Because defendants Melkin, Andrews and Shackleford were acting, at all relevant times in this actin, in their representative capacities as agents of the medical staffs of their respective hospitals, and are thus incapable as a matter of law of conspiring with those hospitals, the Court hereby DISMISSES these individuals from this action. There have been no allegations that these defendants conspired with anyone outside their respective hospitals. In addition, the Court DISMISSES from this action defendants SVMIC, Dr. Hibbett, and Vanderbilt because all federal claims against them have been decided in their favor.

The Court notes that plaintiffs also have alleged in their complaint various state law tort claims by way of the Court's pendent jurisdiction. Although the merits of these claims have not been argued in the motions for summary judgment or addressed in the Magistrate's Report and Recommenda-

tion, to the extent that all federal claims are dismissed as to a defendant this Court declines to exercise jurisdiction to hear any pendent state law claims against that defendant, and hereby DISMISSES such claims without prejudice. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Carnegie-Mellon University v. Cohill*, No. 86-1021, slip op. at 6-7 (6th Cir. January 20, 1988) ("[w]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction") (citation omitted).

SUMMARY

Plaintiffs, a professional partnership created to provide nurse midwife services, its principals, an associated physician, and certain clients, brought this action against defendant hospitals, physicians, and insurance company, seeking injunctive relief and damages for alleged violations of sections 1 and 2 of the Sherman Anti-Trust Act. Plaintiffs generally contend that the defendants were involved in conspiracies, combinations, and contracts designed to prevent the operation of a private practice to provide nurse midwifery services at hospitals in Davidson County and Hendersonville, Tennessee.

Having reviewed the file and the written objections of all the parties to the Magistrate's Report and Recommendation, the Court hereby makes the following *de novo* determination:

(1) The Court ENTERS summary judgment for defendant Vanderbilt Hospital ("Vanderbilt") as to plaintiffs' allegation of conspiracy among Vanderbilt and any members of its medical staff, and DISMISSES this claim from this action;

(2) This Court ENTERS summary judgment for defendants Hendersonville Community Hospital ("HCH") and Dr. Shackleford as to plaintiffs' allegation of conspiracy between them or any other member of HCH's medical staff, and DISMISSES this claim from this action;

(3) The Court ENTERS summary judgment for defendants Southern Hills Hospital ("SHH") and Drs. Melkin, Baer, and Andrews as to plaintiffs' allegation of conspiracy among them or any other members of the SHH medical staff, and DISMISSES this claim from this action;

(4) The Court ENTERS summary judgment for defendants State Volunteer Mutual Insurance Company ("SVMIC") and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them or any other member of the SVMIC board of directors, and DISMISSES this claim from this action;

(5) The Court ENTERS summary judgment for defendants Vanderbilt and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them, and DISMISSES this claim from this case;

(6) The Court DENIES summary judgment for defendants SHH and HCH as to

plaintiffs' allegation of conspiracy between them;

(7) The Court ENTERS summary judgment for defendant Vanderbilt as to plaintiffs' allegation of engaging in a tying arrangement, and DISMISSES this claim from this case;

(8) The Court DISMISSES all pendent state claims against defendants Vanderbilt, SVMIC, and Drs. Shackleford, Melkin, Baer, Andrews, and Hibbett, and hereby DISMISSES these defendants from this action;

(9) This action shall proceed to trial on September 12, 1988, on plaintiffs' claim of conspiracy between SHH and HCH, and any pendent state claims alleged against them.

An Order will be entered simultaneously with this Memorandum.

This the 10th day of March, 1988.

/s/ John T. Nixon
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

NURSE MIDWIFERY ASSOCIATES, ET AL.	)	
VS.	)	DOCKET NO. 82-3208
B.K. HIBBETT, M.D., ET AL.	)	

ORDER

In accordance with the Memorandum filed herewith, the Court makes the following determination:

(1) The Court ENTERS summary judgment for defendant Vanderbilt Hospital ("Vanderbilt") as to plaintiffs' allegation of conspiracy among Vanderbilt and any members of its medical staff, and DISMISSES this claim from this action;

(2) The Court ENTERS summary judgment for defendants Hendersonville Community Hospital ("HCH") and Dr. Shackleford as to plaintiffs' allegation of conspiracy between them or any other member of HCH's medical staff, and DISMISSES this claim from this action;

(3) The Court ENTERS summary judgment for defendants Southern Hills Hospital ("SHH") and Drs. Melkin, Baer, and Andrews as to plaintiffs' allegation of conspiracy among them or any other members of the SHH

medical staff, and DISMISSES this claim from this action;

(4) The Court ENTERS summary judgment for defendants State Volunteer Mutual Insurance company ("SVMIC") and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them or any other member of the SVMIC board of directors, and DISMISSES this claim from this action;

(5) The Court ENTERS summary judgment for defendants Vanderbilt and Dr. Hibbett as to plaintiffs' allegation of conspiracy between them, and DISMISSES this claim from this case;

(6) The Court DENIES summary judgment for defendants SHH and HCH as to plaintiffs' allegation of conspiracy between them;

(7) The Court ENTERS summary judgment for defendant Vanderbilt as to plaintiffs' allegation of engaging in a tying arrangements, and DISMISSES this claim from this case;

(8) The Court DISMISSES all pendent state claims against defendants Vanderbilt, SVMIC, and Drs. Shackleford, Melkin, Baer, Andrews, and Hibbett, and hereby DISMISSES these defendants from this action;

(9) This action shall proceed to trial on September 12, 1988, on plaintiffs' claim of conspiracy between SHH and HCH, and any pendent state claims alleged against them.

Entered this 10th day of March, 1988.

/s/ John T. Nixon
UNITED STATES DISTRICT JUDGE

Nos. 88-5842 & 89-5491

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NURSE MIDWIFERY ASSOCIATES; SUSAN SIZEMORE; VICTORIA HENDERSON; DARRELL MARTIN, M.D.; RICHARD and MARGARET CARPENTER, Plaintiffs-Appellants (88-5842), Plaintiffs-Appellees (88-5491), v. B.K. HIBBETT, M.D.; E. CONRAD SHACKLEFORD, M.D.; GEORGE ANDREWS, M.D.; HARRY BAER, M.D.; STATE VOLUNTEER MUTUAL INSURANCE COMPANY, INC.; and VANDERBILT UNIVERSITY HOSPITAL, Defendants-Appellees (88-5842), SOUTHERN HILLS HOSPITAL; and HENDERSONVILLE COMMUNITY HOSPITAL, Defendants-Appellants (88-5491).	ORDER

Decided and Filed March 12, 1991

BEFORE: MARTIN and NORRIS, Circuit Judges; and CONTE, Senior Circuit Judge.

Plaintiffs, in their petition for rehearing, ask this court to issue a supplemental opinion addressing the disposition on appeal of their claim of conspiracy between State Volunteer Mutual Insurance Company and B.K. Hibbett, M.D.

In order that there be no confusion in this regard, the final paragraph of our opinion, which was filed on November 6, 1990, is modified to read as follows:

"For the reasons stated, we reverse the grant of summary judgment to defendants SVMIC and Dr. Hibbett to the extent that it disposed of plaintiffs' claim that Dr. Hibbett and other principals of SVMIC conspired in violation of the Act, and remand that claim pursuant to Section III(B) of this opinion. We also reverse the district court's decision granting summary judgment in favor of Drs. Melkin, Baer, and Andrews. In all other respects, the decision of the district court is affirmed, and this cause is remanded to the district court for further proceedings consistent with this opinion."

To the extent set out above, the petition for rehearing is granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

Supreme Court, U.S.
FILED
AUG 12 1991
OFFICE OF THE CLERK

(2)

No. 90-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NURSE MIDWIFERY ASSOCIATES,
SUSAN SIZEMORE, VICTORIA HENDERSON
DARRELL MARTIN, M.D.,
RICHARD CARPENTER and MARGARET CARPENTER,
Petitioners,

v.

HENDERSONVILLE COMMUNITY HOSPITAL
and
SOUTHERN HILLS HOSPITAL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Respondents do not agree that the questions set forth in the Questions Presented portion of the Petition for Certiorari are indeed presented.

LIST OF PARTIES

Petitioners are Nurse Midwifery Associates, Susan Sizemore, Victoria Henderson, Darrell Martin, M.D., and Richard and Margaret Carpenter.

The Respondents are Hendersonville Community Hospital and Southern Hills Hospital.

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STATEMENT OF CASE

Introduction

This antitrust action was filed in the United States District Court for the Middle District of Tennessee by two nurse midwives (petitioners Sizemore and Henderson), the obstetrician (petitioner Dr. Martin) with whom they had affiliated, and three of their clients, against three Nashville hospitals (respondents Hendersonville Community Hospital and Southern Hills Hospital, as well as Vanderbilt University Hospital), certain members of the medical staffs of two of respondents, another practicing obstetrician in Nashville, and a physician-controlled insurance company (State Volunteer Mutual Insurance Company). Plaintiffs[1] alleged that these defendants had engaged in several conspiracies to restrain trade, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

Motions for summary judgment dismissing all defendants except respondents Hendersonville Community Hospital and Southern Hills Hospital were granted by the District Court. *Nurse Midwives Assocs. v. Hibbett*, 689 F. Supp. 799 (M.D. Tenn. 1982). Appeals were taken to the United States Court of Appeals for the Sixth Circuit, which affirmed in part and reversed in part, and remanded the case for trial of plaintiffs' claims against some defendants, including claims against respondents Hendersonville Community Hospital and Southern Hills Hospital. *Nurse Midwifery Associates, et al. v. Hibbett, et al.*, 918 F.2d 605 (6th Cir. 1990).

Facts Established for Purposes of Summary Judgment

The following are the facts which the United States Magistrate, the District Court and the Court of Appeals assumed for purposes of the motions for summary judgment filed by defendants; such assumed facts certainly

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[1] For purposes of the Statement of the Case, the parties will be referred to in the capacity which they hold or held in the District Court, either as plaintiff or defendant.

represent the most favorable possible view of the evidence in plaintiffs' favor.

Plaintiffs Sizemore and Henderson are certified nurse midwives who formed plaintiff Nurse Midwifery Associates ("NMA") in order to provide nurse midwifery service in the private sector of the Nashville, Tennessee, area. NMA entered into an agreement with plaintiff Dr. Darrell Martin, a practicing obstetrician, under which NMA would operate as an independent practice, and Dr. Martin and his associates would provide medical supervision and services.

A. Hendersonville Community Hospital and Dr. Shackleford.

Defendant Hendersonville Community Hospital ("HCH") is a privately owned community hospital located in Hendersonville, Tennessee, a small town in the Nashville area. Dr. Martin and his associates were members of the active medical staff of HCH. On February 18, 1980, after initial positive discussions with the administrator of HCH, plaintiffs Henderson and Sizemore submitted their applications for appointment to the medical staff, and for clinical privileges to practice nurse midwifery in collaboration with physicians.

The next day, the hospital's administrator advised Henderson and Sizemore that their applications had been approved by the HCH Obstetrics Department, pending approval of their protocol.[2] On March 8, 1980, the Obstetrics Department approved the protocol.

In late March, the Pediatrics Department, including defendant Dr. Conrad Shackleford, met and discussed the nurse midwifery proposal. The department unanimously recommended that the proposal be rejected, raising six concerns. During April and May, the Obstetrics and Pediatrics Departments held several meetings and, although

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[2] The protocol is the document setting out the details of the supervisory relationship between nurse midwives and the supervising obstetrician.

it appeared that the concerns of the pediatricians had been satisfactorily answered, they refused to approve the protocol.

At a meeting of the Medical-Executive Committee on April 23, 1980, Dr. Shackleford, a member of the Committee, said that a number of pediatricians would leave the staff of HCH if they were required to treat newborns delivered by nurse midwives.

At a subsequent meeting, the members of the Pediatrics Department confirmed that they would not treat newborns delivered by nurse midwives under the on-call schedule normally used for newborns delivered by obstetricians. They agreed that a pediatrician with active privileges at HCH should be recruited by nurse midwives to serve as back-up. Dr. Shackleford joined in these agreements.

On May 20, 1980, the Executive Committee, including Dr. Shackleford, voted to accept the final action of the Pediatrics Department. As a result of these actions, Henderson and Sizemore were unable to initiate their practice at HCH.

B. Southern Hills Hospital and Drs. Melkin, Andrews and Baer.

Defendant Southern Hills Hospital ("SHH") is a small, privately owned community hospital in Nashville to which Sizemore and Henderson also applied for appointment to the medical staff, before final action had been taken by HCH. Sizemore and Dr. Martin met initially with the administrator of SHH who told them that SHH by-laws would permit the granting of privileges to nurse midwives. The administrator was encouraging regarding their proposal, but stated that he did what the doctors at SHH wanted him to do.

On June 18, 1980, the Executive Committee of SHH began its initial review of the applications and appointed an ad hoc committee to investigate the proposal. The committee was composed of defendant Dr. George Andrews,

Chairman of SHH's Obstetrics Department, three other doctors, and an attorney.

In July 1980, Dr. Martin met with defendant Dr. Stephen Melkin, a specialist in OB/GYN at SHH and a member of the Executive Committee. Dr. Melkin displayed an extremely negative reaction toward NMA, stating, "If nurse midwives started delivering babies, the next thing they would want to do is heart surgery." In that same month, defendant Dr. Harry Baer, an obstetrician who was a member of the SHH medical staff, told an obstetrician at Baptist Hospital that plaintiffs would get privileges at Baptist "over his dead body." Dr. Baer practiced medicine in partnership with Dr. Melkin; both practice at Baptist Hospital as well as SHH. Also, Dr. Baer expressed concern that other obstetricians just starting out were not yet "up to capacity."

On August 7, 1980, plaintiffs were given an opportunity to discuss their protocol with the ad hoc committee. The committee, most notably defendant Dr. George Andrews, appeared not to be interested in the manner in which nurse midwives practiced or the specific practice arrangement between the plaintiffs, but seemed overly concerned with the financial relationship between nurse midwives and Dr. Martin.

At the SHH Executive Committee meeting on September 25, 1980, the ad hoc committee's report was adopted, recommending that the nurse midwives' applications be denied in their present form. The report also recommended that privileges be granted if additional conditions were met. The principal conditions were that an obstetrician be present for all deliveries, that two obstetricians with privileges at SHH agree to sponsor, supervise, and assume responsibility for the nurse midwives' actions, and that the sponsoring physicians furnish adequate liability insurance indemnifying SHH for the activities of nurse midwives. The report concluded that these conditions were "necessary to assure quality patient care and reduce any risk of injury to a patient with possible ensuing liability to the Hospital."

On October 16, 1980, the SHH Board of Trustees adopted the recommendation of the Executive Committee and denied the nurse midwives' application for privileges. When the administrator informed the petitioners that their applications had been denied, they asked for a copy of the ad hoc committee's report, but were refused. Dr. Andrews told them that if they were to reapply, the Obstetrics Department would adopt new policies regarding mandatory enemas, perineal shaving, electronic fetal monitoring, intravenous fluids and ambulation, and would close the birthing room.

C. Vanderbilt University, Dr. B.K. Hibbett and State Volunteer Mutual Insurance Company.

SVMIC, Vanderbilt and Dr. Hibbett were not allegedly involved in the conspiracies at HCH and SHH, and no further discussion of facts relating to those defendants is required.

Procedural Course

On March 2, 1981, plaintiffs filed their Complaint raising claims under the Sherman Antitrust Act and various pendent state law claims. The Complaint alleged that competition was restrained due to conspiracies (1) among HCH, Dr. Shackleford, and the other members of the HCH pediatric staff; (2) among SHH and Drs. Melkin, Andrews and Baer; (3) between Vanderbilt and the members of its medical staff; (4) between Vanderbilt and Dr. Hibbett; (5) between HCH and SHH[3]; and (6) between SVMIC and Dr. Hibbett.

Defendants all moved for summary judgment. The District Court held that, under the intracorporate conspiracy doctrine, there could be no conspiracy between the hospitals and their respective medical staffs. *Nurse Midwifery Assocs. v. Hibbett*, 689 F. Supp. 799 (M.D. Tenn. 1988).

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[3] Or so the Court of Appeals stated in its opinion. In fact, however, no such conspiracy was alleged in any pleading, and no such conspiracy was ever suggested until after the motions for summary judgment were filed.

The District Court granted summary judgment on all of plaintiffs' claims, except their claim of a conspiracy between SHH and HCH. Pursuant to Fed. R. Civ. P. 54(b), the District Court entered a final judgment on all of plaintiffs' claims, except for the claim of conspiracy between SHH and HCH. Plaintiffs appealed all of these judgments but plaintiffs thereafter reached a settlement dismissing their claims against Vanderbilt. In addition, the District Court granted defendants SHH and HCH an interlocutory appeal (which the Court of Appeals accepted) pursuant to 28 U.S.C. § 1292(b) on its decision denying summary judgment on plaintiffs' claims of a conspiracy between these two defendants.

The Court of Appeals, *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), held that the intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff but, in certain situations, does not preclude a conspiracy among individual members of the medical staff. It held that Section 1 of the Sherman Act is concerned only with concerted action among competitors and not the coordinated activities that occur within a single firm. It reasoned that when determining whether the intracorporate conspiracy doctrine applies to an alleged conspiracy between a hospital and its medical staff, there are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and the medical staff are not competitors. With respect to the allegations that HCH and SHH conspired with their respective medical staffs, the Court of Appeals concluded that the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.

In addition, with respect to the allegation that Dr. Shackleford conspired with the other pediatricians on the HCH medical staff, the Court of Appeals found that although Dr. Shackleford is a competitor *of the other pediatricians* on the HCH medical staff, NMA's application for privileges at HCH do not relate to the market in which they compete

as individuals *since NMA competes with obstetricians, not pediatricians.*

The Court of Appeals held that with respect to the allegation that Drs. Melkin, Andrews and Baer conspired with each other and other members of the SHH medical staff, the District Court *erred* in concluding that Drs. Melkin, Andrews and Baer were agents of SHH. These doctors, the Court of Appeals held, are competing obstetricians alleged to have joined together to cause SHH to deny privileges to a competitor and, to that extent, are not agents of SHH for purposes of applying the intracorporate conspiracy doctrine.

The Court of Appeals rejected plaintiffs' arguments that an agent acting with anticompetitive motives due to some independent personal stake warrants abandoning the traditional rule that a principal cannot conspire with one of its agents, and declined to adopt this suggested exception.

In summary, the Court of Appeals reversed the District Court's decision granting summary judgment in favor of SVMIC and of Drs. Melkin, Andrews and Baer, and affirmed the decision in all other respects, including its refusal to grant summary judgment on the claim that respondents SHH and HCH conspired with each other. The case was remanded for further proceedings consistent with that opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition for a Writ of Certiorari should be denied for the following reasons.

I. JUDICIAL ECONOMY WOULD BEST BE SERVED BY DENYING THE WRIT.

Petitioners were largely successful in the Court of Appeals, which remanded the case for trial not only against respondents HCH and SHH, but also against Drs. Melkin, Andrews and Baer, and against SVMIC. Regardless of whether this Court grants the writ and affirms or reverses the Court of Appeals, plaintiffs will have their day in Court

against respondents. Curiously, plaintiffs have not sought review by this Court of the dismissal of Dr. Shackleford, who was HCH's alleged co-conspirator. This litigation, which has already been unfortunately protracted, would only be further delayed if this Court were to grant certiorari to address a single narrow aspect of the Court of Appeals' opinion. It is possible that plaintiffs will be successful at trial on their claims that HCH and SHH conspired with one another. Additional appellate review will, in any event, be available following the trial, and this Court may at that time choose whether to address the issues raised in the pending Petition on a complete record, rather than on the abbreviated record presented on a motion for summary judgment.

II. THE ISSUES WHICH PETITIONERS SEEK TO RAISE NEED NOT BE ADDRESSED UNDER THE FACTS OF THIS CASE.

Petitioners ask this Court to consider whether, as a matter of law, a hospital cannot be found to have conspired with members of its medical staff in violation of Section 1 of the Sherman Act by denying staff privileges to practitioners in potential competition with those staff members. However, the Court of Appeals did not hold that a hospital can *never* be found to have conspired with members of its medical staff when it denies such privileges. The Court of Appeals held only as follows:

> *When the staff as a group makes decisions or recommendations for the hospital* in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital. However, when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members.

* * *

> With respect to the allegations that HCH and SHH conspired with their respective medical staffs, for the reasons stated above, we conclude that *the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.*

(Emphasis supplied.) In this case the only conspiracies alleged between the hospitals and members of their respective medical staffs were conspiracies between the hospitals and those members of the medical staffs charged with making decisions or recommendations for the hospitals. At the conclusion of discovery, plaintiffs continued to maintain that they could not "identify the . . . other co-conspirators." (Paragraphs 21(b) and 24(a) of Responses to the First Set of Interrogatories of Defendants Hendersonville Community Hospital, Southern Hills Hospital and Vanderbilt University Hospital by Plaintiffs Sizemore, Henderson, Nurse Midwifery Associates and Martin.) The Court of Appeals was thus not required to decide whether physicians who are *not* charged with responsibility for making peer review recommendations or decisions can enter into an actionable Section 1 conspiracy with a hospital concerning such decisions. To the extent that the physician defendants were acting as agents for HCH and SHH, they could not have conspired with the hospital under the intracorporate conspiracy doctrine. To the extent that they were conspiring with other members of the medical staff to restrain competition from their competitors (which the Court of Appeals expressly found was *not* the case at HCH), the Court of Appeals held that they were not agents of the hospital, and it follows that they could not have conspired with anyone else on the hospital's behalf.

The other issue sought to be raised by petitioners (but not addressed at any length in the body of the Petition) is whether a hospital can be vicariously liable under Section 1 of the Sherman Act for a decision by its medical staff denying staff privileges to practitioners in potential

competition with those staff members. The Court of Appeals was not required to reach that issue. While it found that Dr Shackleford, a pediatrician, was acting as agent for HCH, and that Dr. Shackleford was a competitor of the other pediatricians on HCH's staff, it held that plaintiffs compete with obstetricians, not pediatricians. With respect to SHH, the Court held that Drs. Melkin, Baer, and Andrews were not agents of SHH for purposes of the allegation that they conspired with each other to deny privileges to a competitor. Petitioners do not suggest any basis for holding SHH vicariously liable for actions by persons who were not its agents.

Although not mentioned in the Questions Presented portion of the Petition, petitioners argue that this Court should consider whether there is an independent personal stake exception to the intracorporate conspiracy doctrine. Again, the facts presented do not require consideration of this issue. The District Court had already concluded that, even if such an exception were available, petitioners' claims would still fail. As to the alleged conspiracy between HCH and a member of its medical staff, the District Court found that

> [a]lthough [the medical staff member's] private practice may have given him an independent personal stake in achieving the object of the alleged conspiracy, the facts do not show that he possessed or exercised the power to institute an anti-competitive policy for HCH, a requisite element under the exception where applied.

Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. at 805. Likewise, the District Court also held that such a claim would fail against SHH because "the individual defendants did not possess the power to effect an anti-competitive policy at SHH." *Id.*

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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FILED
AUG 12 1991
OFFICE OF THE CLERK

(3)

No. 90-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NURSE MIDWIFERY ASSOCIATES,
SUSAN SIZEMORE, VICTORIA HENDERSON
DARRELL MARTIN, M.D.,
RICHARD CARPENTER and MARGARET CARPENTER,
Petitioners,

v.

HENDERSONVILLE COMMUNITY HOSPITAL
and
SOUTHERN HILLS HOSPITAL,
Respondents.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF CASE

Introduction

This antitrust action was filed in the United States District Court for the Middle District of Tennessee by two nurse midwives (petitioners Sizemore and Henderson), the obstetrician (petitioner Dr. Martin) with whom they had affiliated, and three of their clients, against three Nashville hospitals (respondents Hendersonville Community Hospital and Southern Hills Hospital, as well as Vanderbilt University Hospital), certain members of the medical staffs of two of respondents, another practicing obstetrician in Nashville, and a physician-controlled insurance company (State Volunteer Mutual Insurance Company). Plaintiffs[1] alleged that these defendants had engaged in several conspiracies to restrain trade, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

Motions for summary judgment dismissing all defendants except respondents Hendersonville Community Hospital and Southern Hills Hospital were granted by the District Court. *Nurse Midwives Assocs. v. Hibbett*, 689 F. Supp. 799 (M.D. Tenn. 1982). Appeals were taken to the United States Court of Appeals for the Sixth Circuit, which affirmed in part and reversed in part, and remanded the case for trial of plaintiffs' claims against some defendants, including claims against respondents Hendersonville Community Hospital and Southern Hills Hospital. *Nurse Midwifery Associates, et al. v. Hibbett, et al.*, 918 F.2d 605 (6th Cir. 1990).

Facts Established for Purposes of Summary Judgment

The following are the facts which the United States Magistrate, the District Court and the Court of Appeals assumed for purposes of the motions for summary judgment filed by defendants; such assumed facts certainly

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[1] For purposes of the Statement of the Case, the parties will be referred to in the capacity which they hold or held in the District Court, either as plaintiff or defendant.

represent the most favorable possible view of the evidence in plaintiffs' favor.

Plaintiffs Sizemore and Henderson are certified nurse midwives who formed plaintiff Nurse Midwifery Associates ("NMA") in order to provide nurse midwifery service in the private sector of the Nashville, Tennessee, area. NMA entered into an agreement with plaintiff Dr. Darrell Martin, a practicing obstetrician, under which NMA would operate as an independent practice, and Dr. Martin and his associates would provide medical supervision and services.

A. Hendersonville Community Hospital and Dr. Shackleford.

Defendant Hendersonville Community Hospital ("HCH") is a privately owned community hospital located in Hendersonville, Tennessee, a small town in the Nashville area. Dr. Martin and his associates were members of the active medical staff of HCH. On February 18, 1980, after initial positive discussions with the administrator of HCH, plaintiffs Henderson and Sizemore submitted their applications for appointment to the medical staff, and for clinical privileges to practice nurse midwifery in collaboration with physicians.

The next day, the hospital's administrator advised Henderson and Sizemore that their applications had been approved by the HCH Obstetrics Department, pending approval of their protocol.[2] On March 8, 1980, the Obstetrics Department approved the protocol.

In late March, the Pediatrics Department, including defendant Dr. Conrad Shackleford, met and discussed the nurse midwifery proposal. The department unanimously recommended that the proposal be rejected, raising six concerns. During April and May, the Obstetrics and Pediatrics Departments held several meetings and, although

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[2] The protocol is the document setting out the details of the supervisory relationship between nurse midwives and the supervising obstetrician.

it appeared that the concerns of the pediatricians had been satisfactorily answered, they refused to approve the protocol.

At a meeting of the Medical-Executive Committee on April 23, 1980, Dr. Shackleford, a member of the Committee, said that a number of pediatricians would leave the staff of HCH if they were required to treat newborns delivered by nurse midwives.

At a subsequent meeting, the members of the Pediatrics Department confirmed that they would not treat newborns delivered by nurse midwives under the on-call schedule normally used for newborns delivered by obstetricians. They agreed that a pediatrician with active privileges at HCH should be recruited by nurse midwives to serve as back-up. Dr. Shackleford joined in these agreements.

On May 20, 1980, the Executive Committee, including Dr. Shackleford, voted to accept the final action of the Pediatrics Department. As a result of these actions, Henderson and Sizemore were unable to initiate their practice at HCH.

B. Southern Hills Hospital and Drs. Melkin, Andrews and Baer.

Defendant Southern Hills Hospital ("SHH") is a small, privately owned community hospital in Nashville to which Sizemore and Henderson also applied for appointment to the medical staff, before final action had been taken by HCH. Sizemore and Dr. Martin met initially with the administrator of SHH who told them that SHH by-laws would permit the granting of privileges to nurse midwives. The administrator was encouraging regarding their proposal, but stated that he did what the doctors at SHH wanted him to do.

On June 18, 1980, the Executive Committee of SHH began its initial review of the applications and appointed an ad hoc committee to investigate the proposal. The committee was composed of defendant Dr. George Andrews,

Chairman of SHH's Obstetrics Department, three other doctors, and an attorney.

In July 1980, Dr. Martin met with defendant Dr. Stephen Melkin, a specialist in OB/GYN at SHH and a member of the Executive Committee. Dr. Melkin displayed an extremely negative reaction toward NMA, stating, "If nurse midwives started delivering babies, the next thing they would want to do is heart surgery." In that same month, defendant Dr. Harry Baer, an obstetrician who was a member of the SHH medical staff, told an obstetrician at Baptist Hospital that plaintiffs would get privileges at Baptist "over his dead body." Dr. Baer practiced medicine in partnership with Dr. Melkin; both practice at Baptist Hospital as well as SHH. Also, Dr. Baer expressed concern that other obstetricians just starting out were not yet "up to capacity."

On August 7, 1980, plaintiffs were given an opportunity to discuss their protocol with the ad hoc committee. The committee, most notably defendant Dr. George Andrews, appeared not to be interested in the manner in which nurse midwives practiced or the specific practice arrangement between the plaintiffs, but seemed overly concerned with the financial relationship between nurse midwives and Dr. Martin.

At the SHH Executive Committee meeting on September 25, 1980, the ad hoc committee's report was adopted, recommending that the nurse midwives' applications be denied in their present form. The report also recommended that privileges be granted if additional conditions were met. The principal conditions were that an obstetrician be present for all deliveries, that two obstetricians with privileges at SHH agree to sponsor, supervise, and assume responsibility for the nurse midwives' actions, and that the sponsoring physicians furnish adequate liability insurance indemnifying SHH for the activities of nurse midwives. The report concluded that these conditions were "necessary to assure quality patient care and reduce any risk of injury to a patient with possible ensuing liability to the Hospital."

On October 16, 1980, the SHH Board of Trustees adopted the recommendation of the Executive Committee and denied the nurse midwives' application for privileges. When the administrator informed the petitioners that their applications had been denied, they asked for a copy of the ad hoc committee's report, but were refused. Dr. Andrews told them that if they were to reapply, the Obstetrics Department would adopt new policies regarding mandatory enemas, perineal shaving, electronic fetal monitoring, intravenous fluids and ambulation, and would close the birthing room.

C. Vanderbilt University, Dr. B.K. Hibbett and State Volunteer Mutual Insurance Company.

SVMIC, Vanderbilt and Dr. Hibbett were not allegedly involved in the conspiracies at HCH and SHH, and no further discussion of facts relating to those defendants is required.

Procedural Course

On March 2, 1981, plaintiffs filed their Complaint raising claims under the Sherman Antitrust Act and various pendent state law claims. The Complaint alleged that competition was restrained due to conspiracies (1) among HCH, Dr. Shackleford, and the other members of the HCH pediatric staff; (2) among SHH and Drs. Melkin, Andrews and Baer; (3) between Vanderbilt and the members of its medical staff; (4) between Vanderbilt and Dr. Hibbett; (5) between HCH and SHH[3]; and (6) between SVMIC and Dr. Hibbett.

Defendants all moved for summary judgment. The District Court held that, under the intracorporate conspiracy doctrine, there could be no conspiracy between the hospitals and their respective medical staffs. *Nurse Midwifery Assocs. v. Hibbett*, 689 F. Supp. 799 (M.D. Tenn. 1988).

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[3] Or so the Court of Appeals stated in its opinion. In fact, however, no such conspiracy was alleged in any pleading, and no such conspiracy was ever suggested until after the motions for summary judgment were filed.

The District Court granted summary judgment on all of plaintiffs' claims, except their claim of a conspiracy between SHH and HCH. Pursuant to Fed. R. Civ. P. 54(b), the District Court entered a final judgment on all of plaintiffs' claims, except for the claim of conspiracy between SHH and HCH. Plaintiffs appealed all of these judgments but plaintiffs thereafter reached a settlement dismissing their claims against Vanderbilt. In addition, the District Court granted defendants SHH and HCH an interlocutory appeal (which the Court of Appeals accepted) pursuant to 28 U.S.C. § 1292(b) on its decision denying summary judgment on plaintiffs' claims of a conspiracy between these two defendants.

The Court of Appeals, *Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), held that the intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff but, in certain situations, does not preclude a conspiracy among individual members of the medical staff. It held that Section 1 of the Sherman Act is concerned only with concerted action among competitors and not the coordinated activities that occur within a single firm. It reasoned that when determining whether the intracorporate conspiracy doctrine applies to an alleged conspiracy between a hospital and its medical staff, there are no strong antitrust concerns that would warrant a departure from traditional concepts of agency since the hospital and the medical staff are not competitors. With respect to the allegations that HCH and SHH conspired with their respective medical staffs, the Court of Appeals concluded that the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.

In addition, with respect to the allegation that Dr. Shackleford conspired with the other pediatricians on the HCH medical staff, the Court of Appeals found that although Dr. Shackleford is a competitor *of the other pediatricians* on the HCH medical staff, NMA's application for privileges at HCH do not relate to the market in which they compete

as individuals *since NMA competes with obstetricians, not pediatricians.*

The Court of Appeals held that with respect to the allegation that Drs. Melkin, Andrews and Baer conspired with each other and other members of the SHH medical staff, the District Court *erred* in concluding that Drs. Melkin, Andrews and Baer were agents of SHH. These doctors, the Court of Appeals held, are competing obstetricians alleged to have joined together to cause SHH to deny privileges to a competitor and, to that extent, are not agents of SHH for purposes of applying the intracorporate conspiracy doctrine.

The Court of Appeals rejected plaintiffs' arguments that an agent acting with anticompetitive motives due to some independent personal stake warrants abandoning the traditional rule that a principal cannot conspire with one of its agents, and declined to adopt this suggested exception.

In summary, the Court of Appeals reversed the District Court's decision granting summary judgment in favor of SVMIC and of Drs. Melkin, Andrews and Baer, and affirmed the decision in all other respects, including its refusal to grant summary judgment on the claim that respondents SHH and HCH conspired with each other. The case was remanded for further proceedings consistent with that opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition for a Writ of Certiorari should be denied for the following reasons.

I. JUDICIAL ECONOMY WOULD BEST BE SERVED BY DENYING THE WRIT.

Petitioners were largely successful in the Court of Appeals, which remanded the case for trial not only against respondents HCH and SHH, but also against Drs. Melkin, Andrews and Baer, and against SVMIC. Regardless of whether this Court grants the writ and affirms or reverses the Court of Appeals, plaintiffs will have their day in Court

against respondents. Curiously, plaintiffs have not sought review by this Court of the dismissal of Dr. Shackleford, who was HCH's alleged co-conspirator. This litigation, which has already been unfortunately protracted, would only be further delayed if this Court were to grant certiorari to address a single narrow aspect of the Court of Appeals' opinion. It is possible that plaintiffs will be successful at trial on their claims that HCH and SHH conspired with one another. Additional appellate review will, in any event, be available following the trial, and this Court may at that time choose whether to address the issues raised in the pending Petition on a complete record, rather than on the abbreviated record presented on a motion for summary judgment.

II. THE ISSUES WHICH PETITIONERS SEEK TO RAISE NEED NOT BE ADDRESSED UNDER THE FACTS OF THIS CASE.

Petitioners ask this Court to consider whether, as a matter of law, a hospital cannot be found to have conspired with members of its medical staff in violation of Section 1 of the Sherman Act by denying staff privileges to practitioners in potential competition with those staff members. However, the Court of Appeals did not hold that a hospital can *never* be found to have conspired with members of its medical staff when it denies such privileges. The Court of Appeals held only as follows:

> *When the staff as a group makes decisions or recommendations for the hospital* in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital. However, when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members.

* * *

> With respect to the allegations that HCH and SHH conspired with their respective medical staffs, for the reasons stated above, we conclude that *the members of the medical staff were acting as agents of the hospital and that, therefore, the intracorporate conspiracy doctrine is controlling.*

(Emphasis supplied.) In this case the only conspiracies alleged between the hospitals and members of their respective medical staffs were conspiracies between the hospitals and those members of the medical staffs charged with making decisions or recommendations for the hospitals. At the conclusion of discovery, plaintiffs continued to maintain that they could not "identify the . . . other co-conspirators." (Paragraphs 21(b) and 24(a) of Responses to the First Set of Interrogatories of Defendants Hendersonville Community Hospital, Southern Hills Hospital and Vanderbilt University Hospital by Plaintiffs Sizemore, Henderson, Nurse Midwifery Associates and Martin.) The Court of Appeals was thus not required to decide whether physicians who are *not* charged with responsibility for making peer review recommendations or decisions can enter into an actionable Section 1 conspiracy with a hospital concerning such decisions. To the extent that the physician defendants were acting as agents for HCH and SHH, they could not have conspired with the hospital under the intracorporate conspiracy doctrine. To the extent that they were conspiring with other members of the medical staff to restrain competition from their competitors (which the Court of Appeals expressly found was *not* the case at HCH), the Court of Appeals held that they were not agents of the hospital, and it follows that they could not have conspired with anyone else on the hospital's behalf.

The other issue sought to be raised by petitioners (but not addressed at any length in the body of the Petition) is whether a hospital can be vicariously liable under Section 1 of the Sherman Act for a decision by its medical staff denying staff privileges to practitioners in potential

competition with those staff members. The Court of Appeals was not required to reach that issue. While it found that Dr Shackleford, a pediatrician, was acting as agent for HCH, and that Dr. Shackleford was a competitor of the other pediatricians on HCH's staff, it held that plaintiffs compete with obstetricians, not pediatricians. With respect to SHH, the Court held that Drs. Melkin, Baer, and Andrews were not agents of SHH for purposes of the allegation that they conspired with each other to deny privileges to a competitor. Petitioners do not suggest any basis for holding SHH vicariously liable for actions by persons who were not its agents.

Although not mentioned in the Questions Presented portion of the Petition, petitioners argue that this Court should consider whether there is an independent personal stake exception to the intracorporate conspiracy doctrine. Again, the facts presented do not require consideration of this issue. The District Court had already concluded that, even if such an exception were available, petitioners' claims would still fail. As to the alleged conspiracy between HCH and a member of its medical staff, the District Court found that

> [a]lthough [the medical staff member's] private practice may have given him an independent personal stake in achieving the object of the alleged conspiracy, the facts do not show that he possessed or exercised the power to institute an anti-competitive policy for HCH, a requisite element under the exception where applied.

Nurse Midwifery Assocs. v. Hibbett, 689 F. Supp. at 805. Likewise, the District Court also held that such a claim would fail against SHH because "the individual defendants did not possess the power to effect an anti-competitive policy at SHH." *Id.*

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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